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No. 95-1682

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

LOUISIANA LEGISLATIVE BLACK CAUCUS,
CONGRESSMAN CLEO FIELDS,
BERNADINE ST. CYR, PATRICK FONTENOT,
HAZEL FREEMAN AND RALPH WILSON, APPELLANTS,

v.

RAY HAYS, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF LOUISIANA

# JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Did the district court err in holding that a state's historical district configurations are irrelevant to the constitutionality of a similarly configured black-majority congressional district, because the state's previous districting plans had not been challenged in litigation and upheld by a federal court?

2. Did the district court err in holding that Louisiana's desire to comply with the Voting Rights Act is proof of an improper racial purpose that requires strict scrutiny of the state's redistricting plan?

3. Did the district court err in ruling that Louisiana has no compelling interest justifying the creation of a majority-black district closely modeled on past majority-white congressional districts, when the state's history of racial discrimination and racially polarized voting has prevented the election of any black person to the state legislature, to Congress, or to a statewide office in Louisiana during this century, except in districts with a majority of black registered voters?

4. Did the district court err in ruling that Louisiana's redistricting plan, drawn in response to this Court's decision in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), is not narrowly tailored, when the challenged majority-black district has only a 54% black voting-age population, resembles white-majority districts previously drawn by the state, and has caused no injury to any plaintiff?

5. Did the district court exceed its authority in imposing a permanent remedial plan that departs from state policy and does not meet the requirements of the Voting Rights Act?

6. Did the district court err in ruling that the plaintiffs suffered sufficient harm to confer standing to sue?

## PARTIES

Actual parties to the proceeding in the United States District Court were:

(1) Ray Hays, Edward L. Adams, Susan Shaw Singleton, Gary Stokely, Patricia Slocum, Richard David, Barbara David, Terry Gillespie, Floyd Gonzalez, Richard Sanders, Parks Sansing, Bobby Williams, plaintiffs, appellees herein

(2) State of Louisiana, defendant, appellant herein

(3) Edwin W. Edwards, in his official capacity as Governor of the State of Louisiana, defendant

(4) Samuel B. Nunez, Jr., in his official capacity as Speaker of the Louisiana House of Representatives, defendant

(5) John A. Alario, in his official capacity as Speaker of the Louisiana House of Representatives, defendant

(6) W. Fox McKeithen, in his official capacity as Secretary of State for the State of Louisiana, defendant

(7) Jerry Fowler, in his official capacity as Commissioner of Elections for the State of Louisiana, defendant

(8) The United States of America, defendant-intervenor, appellant herein

(9) The Louisiana Legislative Black Caucus, defendant-intervenor, appellant herein

(10) Congressman Cleo Fields, defendant-intervenor, appellant herein

(11) Bernardine St. Cyr, Hazel J. Freeman, Patrick Fontenot, Ralph Wilson, defendant-intervenors, appellants herein

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

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# JURISDICTIONAL STATEMENT

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## OPINIONS BELOW

The January 5, 1996 opinion of the three-judge district court has not yet been reported and appears in the Appendix to the Jurisdictional Statement on Behalf of the State of Louisiana ("La. J.S. App.") at La. J.S. App. 1. The district court's order and final judgment, also entered January 5, 1996, is unreported and appears at La. J.S. App. 39. Previous decisions of the district court at earlier phases of this litigation are reported at 839 F. Supp. 1188 (W.D. La. 1993) (*"Hays I"*), *vacated,* 114 S. Ct. 2731 (1994), and 862 F. Supp. 119 (W.D. La. 1994) (*"Hays II"*), *vacated*, 115 S. Ct. 2431 (1995), and appear, respectively, at La. J.S. App. 105 and La. J.S. App. 63.

## JURISDICTION

The judgment of the court below was entered January 5, 1996. The Louisiana Legislative Black Caucus filed its notice of appeal to this Court on February 9, 1996 (App. 1a), Congressman Fields filed his notice of appeal on

February 14, 1996 (App. 6a), and Bernadine St. Cyr, Patrick Fontenot, Hazel Freeman, and Ralph Wilson filed their notice of appeal on February 16, 1996 (App. 10a). On April 1, 1996, Justice Scalia granted the Louisiana Legislative Black Caucus and Congressman Fields an extension of time to and including April 16, 1996, within which to docket the appeal, and this appeal is being docketed within the time provided by that extension. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides, in pertinent part, that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws," and is reproduced at La. J.S. App. 181. Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973, 1973c, are reproduced at La. J.S. App. 182-84.

## STATEMENT OF THE CASE

### A. Background to Adoption of Act 1

This case is a challenge to the second post-1990 congressional plan enacted by the State of Louisiana. The 1990 census resulted in Louisiana losing one of its eight congressional seats. In May 1992, the Legislature enacted Act 42, a new congressional plan with seven congressional districts. The plan included two majority African-American districts. After obtaining the necessary preclearance of the plan under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, the State implemented the plan in the 1992 congressional elections. A map of that plan is reproduced at La. J.S. App. 158.

On July 22, 1992, four registered voters in Louisiana, respondents here, challenged the plan before the United States District Court for the Western District of Louisiana, alleging that the plan violated their rights under, *inter alia*,

the Equal Protection Clause of the Fourteenth Amendment. While these claims were pending, this Court decided *Shaw v. Reno*, 113 S. Ct. 2816 (1993). On December 28, 1993, the three-judge district court issued an opinion and order holding that Act 42 violated the Equal Protection Clause. *Hays I*, La. J.S. App. 105. The court ruled that strict scrutiny of Act 42 was required based on District 4's "highly irregular" shape and the fact that the district was intentionally drawn to include a 63% black voting age population. La. J.S. App. at 129, 142-43. The court further held that Act 42, even if it were supported by a compelling state interest, was unconstitutional because it was not narrowly tailored. The court found that District 4 in Act 42 "pack[ed]" more black voters into the district than was "reasonably necessary to give blacks a realistic chance to determine the outcome of elections there," and that "a second majority black district could have been drawn that would have done substantially less violence to traditional redistricting principles." La. J.S. App. at 150, 153. The State of Louisiana appealed the decision to this Court.

While the State's appeal was pending, the Legislature decided to redraw its congressional districts in response to the district court's decision striking down Act 42. At the request of senators on the reapportionment committee, the State's demographer, Glenn Koepp, began by reviewing Louisiana's prior congressional districts during the 1970's and 1980's, to see if previous versions of Louisiana's 8th Congressional District could be employed as the basis for a new District 4. La. Ex. 1 (1994), 4/18/94 Senate Comm. Tr. 14; Bagneris Test., 7/21/94 p.m., Tr. 105, 117; Koepp Test., 7/21/94 a.m., Tr. 13. For 25 years (1967-1992), Louisiana drew its 8th Congressional District in a rough diagonal that followed parishes along the Red River Valley extending from the northwest and central parts of the State to areas along the Mississippi River, ending south of Baton Rouge. These areas have substantial concentrations of black citizens;

indeed, as of 1990 the old 8th Congressional District had a 38% black population. Engstrom Report, State Ex. 13 (1994), at 4. One version of the old 8th District stretched from the Texas border in the northwest down to Lake Pontchartrain (near New Orleans) in the southeast. La. J.S. App. 196. Maps of Louisiana's congressional districts from 1967-1992 are reproduced at La. J.S. App. 195-98.

Koepp was instructed to determine whether, using the previous plans as a model, a plan including two majority-black districts could be created that could obtain a consensus in the Legislature while avoiding the deficiencies that the district court had found in Act 42. Koepp Test., 7/21/94 a.m., Tr. 5-8, 13; Brinkhaus Test., 7/22/94 a.m. Tr. 9-11. Koepp believed that if a "bizarre" configuration were required in order to draw a second majority-black district, he should not propose such a plan because "the legislature would not have adopted it." Koepp Test., 7/21/94 a.m., Tr. 33-34. As Koepp explained: "It wasn't just that you had to do it [i.e., draw two majority-black districts], you either had to show that you can do it and meet this Court's requirements . . . and have a second minority district or you couldn't do that." *Id.*

Koepp was able to succeed. New District 4, as drawn in Act 1, includes a black voting-age population of 54%, State Ex. 13, and, like the old 8th District, is centered on a Red River-Mississippi River axis. *See* Map of Act 1, La. J.S. App. 194. Louisiana legislators expressly discussed, during the 1994 Special Session on redistricting, the resemblance between the old 8th District and proposed District 4, examining maps of Louisiana's prior congressional plans for purposes of comparison. La. Ex. 1 (1994), 4/18/94 Senate Committee Hearing Tr. 235-257; Greene Test., 10/30/95 Tr. 50. As Speaker *Pro Tem* Sherman Copelin explained during hearings before the House & Governmental Affairs Committee ("House Committee"), District 4 under Act 1 "is basically the same district that Gillis Long had for years[.]"

4/18/94 House Committee Hearing Tr. 46.[1] Act 1 maintains 50 of Louisiana's 64 parishes as whole parishes, splitting 14.[2]

In adopting Act 1, the Legislature recognized that voting is highly racially polarized in Louisiana. Although the state has a black population of 30.6%, in this century no black candidate has ever been elected to statewide office in Louisiana, and no black candidate has ever been elected either to Congress or to the state legislature from any district with a white registered voter majority. As the 1992 proceedings in this case established, even with a 38% black population in the old 8th District during the 1980s, black voters exercised no meaningful influence over the outcome of elections, and their representative was unresponsive to the interests of black voters. Engstrom Test., 8/27/92, Tr. 358-59. Legislators expressly considered the need to remedy this racial discrimination and comply with Sections 2 and 5 of the Voting Rights Act, as confirmed by the transcripts of the committee hearings held during the special session as well as the testimony at trial.[3]

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[1] *See also* 4/18/94 House Committee Hearing Tr. 55-56 (remarks of Representative Reilly); Def. Ex. 18 (1994), Declaration of Representative Raymond Jetson, ¶ 7; Bagneris Test., 7/21/94 p.m. Tr. 117-18.

[2] The congressional plan in effect in Louisiana during the 1980s split 7 parishes, while the districts in Louisiana's 1992 plan, Act 42, split 28 parishes.

[3] *E.g.*, 4/18/94 House Committee Hearing, Tr. 62-64, remarks of Sen. Bajoie ("No African-American was elected to Congress from Louisiana in this century until 1990, after the first majority African-American district was created"); Senate Committee Hearing, Tr. 72, remarks of Sen. Guidry ("I think that the Voting Rights Act and the Constitution require[] that each individual have an opportunity to participate in the electoral process and have an opportunity to elect a person of their choice"); *id.* at Tr.

In sum, in creating the plan that became Act 1, the State sought to balance "[c]ompactness, contiguity, the political boundaries, the geographic boundaries, the . . . community interest, . . . party consideration[s] such as incumbency", as well as the Voting Rights Act. Bagneris Test., 7/21/94 p.m., Tr. 120. According to Glenn Koepp, "What we were doing was attempting to meet *all* of the criteria." Koepp Test., 7/21/94 a.m., Tr. 33 (emphasis added).

**B. Legal Proceedings Following Adoption of Act 1**

Following Louisiana's enactment of the new redistricting plan in Act 1, this Court on June 27, 1994, granted the State's motion to vacate the December 28, 1993 decision of the three-judge court, and remanded the case to the three-judge court for further proceedings in light of Act 1. *Louisiana v. Hays*, 114 S. Ct. 2731 (1994). On July 6, 1994, the three-judge court granted leave to the original *Hays* plaintiffs (Ray Hays, Gary Stokley, Edward Adams, and Susan Shaw Singleton) (hereafter, the "*Hays*" plaintiffs) to amend their complaint to challenge the constitutionality of Act 1. The United States intervened to defend the constitutionality of Act 1.

None of the *Hays* plaintiffs resided in the new 4th Congressional District created by Act 1. The district court denied motions for leave to intervene filed by residents of District 4 (Bernadine St. Cyr, Patrick Fontenot, Hazel

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263, remarks of Glenn Koepp (proposed plan is "narrowly tailored and "gives minorities a[n] opportunity to elect a candidate of their choice. It gives them access to the political process"). *See also* Brinkhaus Test., 7/22/94 a.m., Tr. 22-23, 34 (testifying that he considered need to remedy effects of past discrimination and that "[i]t's 55 percent registered voters what it is to make it effective, so it's [a] level playing field."); Koepp Test., 7/21/94 a.m., Tr. 20-23; Declaration of Rep. Joseph Accardo, Jr., State's Ex. 16 (1994); Bagneris Test., 7/21/94 p.m., Tr. 107.

Freeman, and Ralph Wilson) and the Louisiana Legislative Black Caucus.

The district court set the case down for trial on the merits to begin on July 21, 1994, two weeks after the amendment of the complaint. At the conclusion of the one-and-a-half-day trial, after a 15-minute recess, the court announced its decision striking down Act 1 on July 22, 1994. The court entered judgment on July 25, 1994, and ordered into effect its own redistricting plan. In an opinion filed July 29, 1994, the court ruled that District 4 was subject to strict scrutiny under *Shaw* because it was drawn with the "specific intent" to create a majority-black district. *Hays II*, La. J.S. App. 66. The district court further ruled that Louisiana had no compelling interest in drawing a second majority-black congressional district, either to overcome past racial discrimination and the effects of racially polarized voting, or to comply with the Voting Rights Act. La. J.S. App. 68-71.

The State and the United States appealed. On August 11, 1994, this Court stayed the district court's judgment, 115 S. Ct. 31 (1994), and subsequently noted probable jurisdiction. 115 S. Ct. 687 (1994). On June 29, 1995, this Court vacated the district court's judgment and directed the district court to dismiss the complaint, holding that the *Hays* plaintiffs lacked standing to challenge the constitutionality of District 4 because they did not reside in the district and had suffered no cognizable injury. *United States v. Hays*, 115 S. Ct. 2431 (1995).

Notwithstanding this Court's ruling on standing, the district court, on remand, granted the *Hays* plaintiffs leave to amend their complaint again, holding that these non-residents of District 4 could remain as plaintiffs while adding several residents of District 4 as new plaintiffs. Order, July 31, 1995. The new plaintiffs were Patricia Slocum, who ran unsuccessfully as a Republican candidate in District 4 in 1994, and a number of her supporters (hereafter, the

"*Slocum* plaintiffs"). The district court also granted motions by the Louisiana Legislative Black Caucus, Congressman Cleo Fields (who represents District 4), and District 4 voters Bernadine St. Cyr, Patrick Fontenot, Hazel Freeman, and Ralph Wilson, for leave to intervene as defendants. Order, August 9, 1995. The court set trial for October 30-31, 1995.

On January 5, 1996, the district court issued its decision, again striking down District 4, imposing a court-drawn plan for use in all future congressional elections (the same plan it attempted to impose in 1994), and ordering the State of Louisiana to obtain advance approval from the district court if it wishes to implement a different redistricting plan. La. J.S. App. 1-40. Citing *Miller v. Johnson*, 115 S. Ct. 2475 (1995), the district court stated that race was the Legislature's predominant motive in creating Act 1 and that the Legislature disregarded traditional redistricting principles in drawing District 4. La. J.S. App. 13-14. The court stated that District 4 is the longest district drawn by the state and that the district includes "numerous and diverse cultures, each with its unique identity, history, economy [and] religious preference." La. J.S. App. 14. The court also cited the parishes and municipalities split by District 4, noting that the split portions of the parishes and municipalities included in District 4 had larger proportions of black voters than the portions outside of District 4. La. J.S. App. 14. The court further found that the State's demographer, Glenn Koepp, "admit[ted]" that he "concentrated virtually exclusively on racial demographics and considered essentially no other factor" except one-person, one-vote requirements. La. J.S. App. 15.[4]

The district court termed "spurious" the Legislature's reliance on the resemblance between the old 8th District and

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[4] The district court's opinion contains no citations to the trial transcript or any of the exhibits introduced in the case.

District 4 in Act 1. La. J.S. App. 16. The court held that the old 8th could not be a proper model for the State's redistricting efforts because the old 8th was "never challenged on constitutional grounds." La. J.S. App. 17 n.48. The court also stated that Mr. Koepp had "concede[d]" that "the Old Eighth itself was used as a guise for amassing a large percentage of minority voters into one district, not as a means of following traditional district boundaries." La. J.S. App. 17. The court rejected as "post-hoc rationalizations" the evidence that District 4 follows the Red River and includes persons with common interests. La. J.S. App. 16.

Based primarily on its finding that District 4 is noncompact, the court further ruled that the State had no compelling interest in drawing a second majority-black district, either to comply with the Voting Rights Act or to remedy the state's past voting discrimination, and that District 4 was not narrowly tailored. La. J.S. App. 17-21.

Without providing the Legislature an opportunity to draw a remedial plan, or holding proceedings on remedy, the court enjoined further elections under Act 1 and re-imposed the same plan it had drawn in 1994. The district court explained that Louisiana should not be entrusted with the authority to redraw its congressional districts because the State had "continued its vigorous legal defense" of Act 1 after the district court had entered its judgment striking down Act 1 in 1994. La. J.S. App. 22.[5]

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[5] The district court also stated that it adopted by reference all findings of fact and conclusions of law from its opinions in *Hays I* and *Hays II*, except to the extent that they were "inconsistent with subsequent Supreme Court precedent" or otherwise superseded by later events. La. J.S. App. 4-5 nn. 10, 16. However, the court did not identify which of its findings or conclusions it considered to fall into these categories.

The district court denied motions by the appellants for a stay pending appeal. La. J.S. App. 54, 46. All appellants have filed applications with this Court for a stay pending appeal, and those applications remain pending.

## REASONS FOR NOTING PROBABLE JURISDICTION

This is the first redistricting case brought to this Court that presents the question of the constitutionality of a redistricting plan that a state legislature already has redrawn for the specific purpose of complying with the principles established in *Shaw v. Reno*, 113 S. Ct. 2816 (1993).[6] In striking down Louisiana's balanced, reasonable, narrowly tailored redistricting plan, the district court substantially misconstrued this Court's precedents and imposed its own subjective redistricting preferences as the measure of Act 1's constitutionality. The district court refused to measure the 4th Congressional District by the yardstick of Louisiana's own past redistricting plans, contrary to this Court's ruling in *Miller v. Johnson*, 115 S. Ct. 2475 (1995). The district court further erred in holding that Louisiana's desire to comply with the Voting Rights Act was itself proof of a racial purpose requiring strict scrutiny, a ruling that would render presumptively unconstitutional

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[6] This Court in 1994 stayed the judgment of the court below striking down Act 1, and subsequently noted probable jurisdiction. *Louisiana v. Hays*, 115 S. Ct. 31 (1994) (order granting stay); *Louisiana v. Hays*, 115 S. Ct. 687 (1994) (order noting probable jurisdiction). The congressional plan at issue in this appeal is the same plan, Act 1, which was the subject of the 1994 appeal. Although plaintiffs now include several residents of District 4 who joined the complaint in July 1995, the district court's reasoning in striking down Act 1 is the same reasoning it used in its 1994 judgment, and the substantive issues raised by this appeal are identical to those raised in 1994 when this Court issued a stay and noted probable jurisdiction.

virtually every majority-minority district drawn by a state legislature after the 1990 Census.

The district court's decision, if upheld, would also reduce to an empty slogan this Court's holding in *Miller* that "there is a significant state interest in eradicating the effects of past discrimination." *Id.* at 2490. If the record of racial discrimination and racially polarized voting in Louisiana is insufficient to provide a compelling interest supporting the adoption of Act 1, it is doubtful that there is any jurisdiction in the United States where a race-conscious redistricting plan could survive review once a court determines that strict scrutiny is required under *Miller*. The breadth of the district court's rule is especially apparent considering that Louisiana, in crafting District 4, enacted the most narrowly tailored majority-black district that could have been created -- a district more compact than those offered by the plaintiffs as examples of narrow tailoring during the 1993 trial of *Hays I*.

By denying a state with Louisiana's record of racial discrimination the authority to draw even the most narrowly tailored majority-black district, the district court's ruling leaves no room for voluntary remedial efforts by the states. The decision of the court below thus conflicts with decisions of other three-judge district courts that have upheld majority-minority election districts drawn to overcome the legacy of racial discrimination and assure compliance with the Voting Rights Act, even if the resulting redistricting plans may depart from a court's conception of ideal compactness.[7]

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[7] *King v. State Board of Elections*, 1996 WL 130439 (N.D. Ill. March 11, 1996)(three-judge court) (compliance with Section 2 of Voting Rights Act provided compelling justification for majority-Hispanic district, despite irregular shape of district); *Vera v. Richards*, 861 F. Supp. 1304, 1316, 1325-26, 1343-44 (S.D. Tex. 1994) (three-judge court) (striking down certain "bizarre[ly]"

The district court also exceeded its authority in imposing a remedial plan that conflicts with valid state policy choices, guarantees that black citizens will have no opportunity to elect a candidate of their choice in six of the state's seven congressional districts, and violates Section 2 of the Voting Rights Act, 42 U.S.C. §1973.

## I. THE DISTRICT COURT MISAPPLIED THE HOLDING OF *MILLER V. JOHNSON* IN SUBJECTING ACT 1 TO STRICT SCRUTINY DESPITE THE LEGISLATURE'S RELIANCE ON ITS CUSTOMARY REDISTRICTING PRACTICES.

To subject a congressional district to strict scrutiny, a plaintiff must establish that race was the "predominant" and "overriding" factor in creating the district, *Miller v. Johnson*, 115 S. Ct. 2475, 2488-89 (1995), by proving that the state "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* at 2488. As Justice O'Connor observed in *Miller*, "the threshold standard the Court adopts . . . [is] a demanding one," *id.* at 2497, requiring strict scrutiny of a race-conscious

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shaped majority-minority districts in Dallas and Houston that could have been drawn in more compact manner, but upholding 250-mile long district which split city and county lines in creating "safe" majority-Hispanic district to comply with Voting Rights Act), *prob. juris. noted sub nom. Bush v. Vera*, 115 S. Ct. 2639 (June 29, 1995). *See also DeWitt v. Wilson*, 856 F. Supp. 1409, 1414 (E.D. Cal. 1994) (three-judge court) (upholding congressional and state legislative redistricting plans created by California Supreme Court in *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992), where minority districts met goal of "functional compactness," although plan split counties and cities to facilitate creation of minority districts, *id.* at 582, 594), *aff'd in part, appeal dismissed in part*, 115 S. Ct. 2637 (1995).

plan only when a jurisdiction has "relied on race in *substantial disregard* of customary and traditional districting practices." *Id.* (emphasis added). The *Miller* standard is thus limited to "extreme instances of gerrymandering." *Id.*

The district court's first ruling striking down Act 1 in 1994 was premised on its belief that *any* intentional creation of a majority-black congressional district is presumptively unconstitutional and subjects a plan to strict scrutiny. *See Hays II*, La. J.S. App. 67 ("race conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny"). That reasoning conflicts with both *Shaw* and *Miller*.[8] Although the district court has now rephrased its ruling to conform to the language of *Miller*, declaring that the Legislature "subordinated traditional race-neutral districting principles" in adopting Act 1, La. J.S. App. 13, the record and the district court's own analysis show that this ruling remains grounded on a fundamental misapprehension of the legal principles set forth in *Shaw* and *Miller*.

Most importantly, the district court failed to measure the 4th Congressional District by the yardstick of Louisiana's own past redistricting plans. As the district court itself suggested in 1993 in *Hays I*, the Louisiana Legislature was able to draw a "*significantly* more compact" majority-black district after its first redistricting plan was invalidated -- one that comports "*much* more closely" with traditional redistricting principles than the invalidated plan. *Hays I*, La. J.S. App. at 153-54 (emphasis added). Every witness involved in the preparation of Act 1 confirmed that the plan

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[8] *Shaw* "express[ed] no view as to whether the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim." 113 S. Ct. at 2828. In *Miller v. Johnson*, the Court ruled that race-consciousness in drawing district lines would not alone render a districting plan presumptively unconstitutional. 115 S. Ct. at 2488.

was deliberately modeled on past versions of Louisiana's 8th Congressional District, which for 25 years (1967-1992) was drawn in a rough diagonal that included Red River Valley parishes in the northwest and/or central parts of the State and extended south of Baton Rouge. The new 4th District is configured along the same axis, generally following the Red River and the Mississippi River. The maps of the congressional plans themselves, which the legislators reviewed during the Special Session, confirm that District 4 resembles past majority-white districts in Louisiana.[9]

The district court gave two reasons for dismissing as unimportant the resemblance between District 4 in Act 1 and Louisiana's old 8th District. Neither withstands scrutiny. First, the district court ruled that Louisiana's previous congressional districts on which the 4th District was based should be considered inherently suspect, because "the 'Old Eighth' was never challenged on constitutional grounds." La. J.S. App. 17 n.48.[10] Under this ruling, a state may not rely upon its past redistricting plans unless those plans have themselves previously been challenged in litigation and upheld by a federal court. Such a rule has no

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[9] *See* Senate Committee Hearing Tr. 49, remarks of Glenn Koepp ("a lot of similarities" between old 8th and new 4th); Hilliard Test., 7/21/94 a.m. Tr. 53 ("strong resemblance"); House Committee Hearing Tr. 46, remarks of Rep. Copelin; Bagneris Test., 7/21/94 p.m. Tr. 117-18; State Ex. 16 (1994), Accardo Decl. at 3.

[10] *See also Hays II*, La. J.S. App. 66 (stating that configuration of old 8th Congressional District should be disregarded because old 8th was "certainly bizarre," was enacted "before Shaw," and was "never challenged"); *id.*, La. J.S. App. 78-79 (holding that "the tradition of the past regarding the old eighth district" is not "binding on this Court, due to the fact that the old eighth district was never challenged on constitutionality by any court in the United States.") (Shaw, D.J., joined by Wiener, J., concurring).

basis in *Miller*, and indeed would conflict with the well-established proposition that legislative enactments are deemed lawful unless proven otherwise, *see Voinovich v. Quilter*, 113 S. Ct. 1149, 1156-57 (1993).

Second, the district court stated that the Legislature's effort to model a district on the old 8th District was itself improper because the old 8th District had a large concentration of black citizens, therefore proving that Act 1 was unconstitutionally race-based. La. J.S. App. 16. This reasoning ignores the careful distinction drawn in *Miller* between mere race-conscious redistricting (which is not in itself necessarily suspect) and race-conscious redistricting that disregards the state's own "customary and traditional redistricting practices" (which is). *Miller*, 115 S. Ct. at 1497 (O'Connor, J., concurring). Nothing in *Miller* disqualifies a state from using, as building blocks in redistricting, the core of a previous district that included a substantial minority concentration. By doing so, Louisiana was able to create a majority-black congressional district that visually resembles previous white-majority districts, while also achieving a regional balance and satisfying considerations of partisan fairness. Thus, rather than rendering Louisiana's plan inherently suspect, the State's reliance on its past district configurations reflects precisely the type of respect for traditional practices that makes strict scrutiny unnecessary under *Miller*.

The district court's dismissal of District 4's resemblance to past districts drawn by the State also reveals a deeper flaw. Once a court discounts a state's individual history and past practices as the touchstone for redistricting, it opens the field to a wholesale substitution of the court's own preferences as the measure of constitutionality. In fact, the appellees now effectively concede that during the most recent trial, their proof was directed toward convincing the district court that its own 1994 court-ordered plan would be the optimal choice for Louisiana, rather than toward proving

the unconstitutionality of Act 1.[11] The district court disliked District 4, as it explained in 1994, because it mixed together areas that grow different agricultural crops ("cotton, soybean, rice, sugar cane, and timber") and because it mixed members of different ethnic and religious groups ("District 4 includes North Louisiana English-Scotch-Irish, mainline Protestants, South Louisiana French-Spanish-German Roman Catholics, traditional rural black Protestants, and Creoles"). *Hays II*, La. J.S. App. 78 (Shaw, D.J., concurring, joined by Weiner, J.). *See also Hays III*, La. J.S. App. 14 (criticizing District 4 because it includes "numerous and diverse cultures, each with its unique identity, history, economy [and] religious preference"). The old 8th District, of course, suffered from many of these same "flaws." In judging Act 1 against the district court's vision of an optimal redistricting plan, and failing to give proper deference to the Legislature's determination that Act 1 comported with Louisiana's customary practices, the district court departed drastically from the core holding of *Miller*.

Finally, the district court erred in holding that Louisiana's desire to comply with the Voting Rights Act was proof of a racial purpose that renders a plan presumptively unconstitutional. J.S. App. at 15-16. As this Court noted in *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2661 (1994), "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to assure equal political and electoral opportunity." Considered compliance with the Voting Rights Act therefore does not weigh in favor of finding that race

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[11] Appellees' Opposition to Pending Applications for Stay Pending Appeal at 4 ("a giant exhibit of the court's 1994 plan stood 'as a brooding omnipresence' during trial and was a focus of testimony from every one of plaintiffs' witnesses"); *id.* at 5 (noting "great prominence given to the court's 1994 plan before, during and after trial").

was the predominant factor behind any districting scheme.[12] The question, under *Miller*, is not whether Louisiana harbored a desire to comply with the Voting Rights Act, but whether, in creating a majority-black district, the Legislature also took reasonable steps to follow its customary redistricting practices and to balance traditional non-racial considerations. Because Louisiana did precisely that in creating Act 1, strict scrutiny is not mandated under *Miller*.

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[12] Despite the district court's attempt to cast Louisiana as merely the instrument of a Justice Department policy of alleged "maximization," La. J.S. App. 16, the facts in Louisiana simply cannot be squeezed into the mold set by Georgia's redistricting history in *Miller v. Johnson*. Louisiana's demographer, Glenn Koepp, confirmed that the Department of Justice played *no* role in his preparation of the legislation that became Act 1. Koepp Dep. 9/15/95 at 134. Indeed, that plan *decreased* the black voting age population in District 4 from 63% to 54%, but nevertheless received preclearance from the Department of Justice. Rather than months of demands and communications from the Justice Department, the district court cites one letter dated April 20, 1994, in which the Justice Department stated that Louisiana could draw a second majority-black congressional district in a manner that is narrowly tailored and that a plan without such a district would likely violate the Voting Rights Act. Pl. Ex. 21 (1995). This letter arrived long *after* the Governor and the legislative leadership had determined that a consensus existed in favor of the plan drawn by Mr. Koepp. Koepp Test., 7/21/94 a.m., Tr. 43-49. Not one Louisiana legislator testified at trial that his vote had been affected by the Justice Department's letter.

## II. THE DISTRICT COURT ERRED IN DISMISSING AS INADEQUATE ALL THE COMPELLING INTERESTS SUPPORTING ACT 1 AND IN FINDING THE PLAN NOT NARROWLY TAILORED.

If the record of racial discrimination and racially polarized voting in Louisiana is insufficient to provide a compelling interest supporting the adoption of Act 1, it is doubtful that there is any jurisdiction in the United States where a race-conscious redistricting plan could survive review once a court determines that *Miller* requires strict scrutiny. It is impossible to imagine a stronger record supporting remedial action than the record presented here. Further, in revising its first redistricting plan, Act 42, and adopting Act 1, the State adopted the most narrowly tailored majority-black district that it could devise. The Court should note probable jurisdiction to make clear that *Miller v. Johnson* does not deprive state legislatures of all authority to take voluntary action to comply with the Voting Rights Act and to overcome the exclusion of racial minorities from the mainstream of the state's political life.

### A. *Act 1 Furthers Compelling State Interests.*

In Louisiana, whose population is 30% black, no black candidate has been elected to any statewide office in this century, and no black candidate in this century has won election either to Congress or to the Louisiana Legislature from a district where whites comprise a majority of the registered voters. Engstrom Report, State Ex. 13 (1994). Statistical analyses of voting patterns demonstrate indisputably that voting in Louisiana elections, including congressional elections, is severely polarized along racial lines. *Id.* Despite receiving overwhelming support from black voters, black candidates who ran in five congressional elections in the old 8th Congressional District from 1986-

1990 received an average of only 9.3% of the white vote.[13] Further, in recent state legislative races between black candidates and white candidates, black candidates received on average 86.3% of the black vote and a mere 7.2% of the white vote. *Id.* Even appellees' expert witness, Dr. William Allen, concluded that voting is racially polarized in Louisiana. Deposition of Dr. William Barclay Allen (hereafter "Allen Dep.") at 112-114, 144, 149.

Numerous court decisions, most notably a 1983 decision striking down Louisiana's congressional redistricting plan for unlawfully diluting black voting strength, have found that Louisiana has a lengthy history of racial discrimination in voting practices and other walks of life. *Major v. Treen*, 574 F. Supp. 325, 339-40, 352-55 (E.D. La. 1983). Political campaigns in Louisiana, including campaigns for congressional office, often have been characterized by racial appeals.[14] The first-hand experiences of African-American

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[13] State Ex. 15 (1994). The racial breakdown in these election results is as follows:

| | % of black voters for black candidate | % of white voters for black candidate |
|---|---|---|
| 1990 Primary | 84.7% | 3.2% |
| 1988 Runoff | 96.7% | 14.9% |
| 1988 Primary | 91.0% | 3.3% |
| 1986 Runoff | 97.0% | 21.6% |
| 1986 Primary | 68.3% | 3.3% |

[14] For example, Clyde Holloway, who won election to the 8th Congressional District in 1988, characterized his black opponent in a newspaper interview as follows: "I just believe she was sent in here to run for Congress . . . . I don't know whether it was the Black Congressional Caucus who sent her to run, or the N.A.A.C.P. . . ." (quoted in Report of Dr. Keith Reeves, Def.-Int. Ex. 2 (1995), at 5).

witnesses who testified at trial, as well as those of white advocates for the poor such as Sister Margaret McCaffrey, confirmed the continuing, present-day impact of racial discrimination and political exclusion in Louisiana.[15] The evidence also confirmed that black citizens in Louisiana have had little influence on their elected representatives in majority-white congressional districts, even when the district has had a substantial black minority. State Ex. 13 (1994), Engstrom Report, at 7-8.

In the face of this record, the district court's finding of unconstitutionality contravenes this Court's recent admonition that strict scrutiny is *not* "strict in theory but fatal in fact." *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995) (internal quotations and citation omitted). In the end, the district court's *only* articulated reason for denying the presence of a compelling interest supporting Act 1 was its conclusion that District 4 does not sufficiently honor traditional redistricting principles and is noncompact -- the very conclusion that, under *Miller*, *brought about* the

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[15] The applicants offered testimony spanning the last five decades of racial discrimination suffered by African Americans in Louisiana and, in particular, the areas included in the 4th District. *See* Fontenot Test., 10/30/95 p.m., Tr. 185 (describing murder of NAACP official who attempted to register black voters in Opelousas, Louisiana area in 1950's, cross-burnings, and other acts of intimidation); Deposition of Bernadine St. Cyr (hereafter "St. Cyr Dep.") at 10 (recalling "learning how not to drink from a white water fountain, not to even think about going to Poydras Elementary School, [and] going to the back door if I wanted a hamburger at a restaurant" in New Roads, Louisiana in 1960s); McCaffrey Test., 10/31/95 a.m., Tr. 249 (testimony regarding "whites only" park in predominately black neighborhood in Shreveport in 1970s); *id.* at 246 (testimony concerning hostility of local officials towards blacks attempting to register to vote in 1980s); *id.* at 251-52 (describing racially discriminatory zoning proposals put forward in Shreveport in 1994).

application of strict scrutiny in the first place. Thus, under the district court's analysis, a district that is found to depart substantially from traditional redistricting practices is required to undergo strict scrutiny and is also, for that very reason, unable to survive strict scrutiny. To the contrary, Act 1 is justified by Louisiana's compelling interests in complying with the Voting Rights Act and overcoming the State's history of racial discrimination and racially polarized voting.

1. Act 1 Is Supported by Louisiana's Compelling Interest in Complying with the Voting Rights Act.

The district court rejected compliance with Section 2 as a proper remedial basis for District 4 solely because it deemed District 4 insufficiently compact to make a *prima facie* showing under the threshold test set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986). This was error, because a minority group satisfies the *Gingles* threshold standard of numerosity and compactness if a majority-minority district can be drawn that is reasonably comparable in configuration to white-majority districts previously drawn by the state. *Jeffers v. Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1990) (three-judge court) (proposed majority-black legislative districts, although somewhat irregular in configuration, satisfied *Gingles* threshold standard because they were "not materially stranger in shape" than other legislatively drawn districts), *aff'd mem.*, 498 U.S. 1019 (1991).[16]

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[16] *See also Cane v. Worcester County*, 35 F.3d 921, 926-27 n.6 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (1995) (proposed district acceptable under Gingles, despite irregularities in shape, because it is "similar in appearance to one of the former residency districts"); *Clark v. Calhoun County*, 21 F.3d 92, 95-96 & n.2 (5th Cir. 1994) (districts need not conform to absolute standard of compactness to meet burden under *Gingles*); *Marylanders for Fair*

The Louisiana Legislature conscientiously reviewed the state's past congressional district maps and determined that proposed District 4 was reasonably consistent with previous white-majority districts drawn by Louisiana. Contrary to the district court's charge of "post-hoc rationalizations," La. J.S. App. 16, it is undisputed that this review and discussion of Louisiana's past redistricting plans took place *during the legislative session*; indeed, even plaintiffs' witness, Senator Tom Greene, conceded this. Greene Test., 10/30/95, Tr. 50. Of course, the Legislature was also aware of the district court's 1993 decision on Act 42, which found that the "evidence . . . undeniably established" that "a second black majority district could have been drawn that would have done *substantially* less violence to traditional redistricting principles." La. J.S. App. 153 (emphasis added).

A state may take race-conscious action to assure compliance with federal law when "there is sufficient evidence to justify the conclusion that there has been prior discrimination." *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion); *id.* at 292-93 (O'Connor, J., concurring in part and concurring in judgment). A court is *not* required to "make an actual finding of prior discrimination based on the [state actor's] proof" before race-conscious action will be upheld. *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in judgment). Instead, remedial action is permissible so long as the state actor has "a firm basis for concluding that remedial action [is] appropriate." *Id.* at 293. By rejecting the requirement of proving an actual constitutional or statutory violation as a predicate for race-conscious remedial

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*Representation v. Schaefer*, 849 F. Supp. 1022, 1053 (D. Md. 1994) (three-judge court) (comparing configuration of proposed majority-black district to configuration of majority-white districts in determining that district satisfied *Gingles* standard).

action, this Court has recognized that states are "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent . . . discrimination and liability to nonminorities if affirmative action *is* taken." *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring in part and concurring in judgment) (emphasis in original); *id.* at 290 (O'Connor, J., concurring in part and concurring in judgment) (recognizing "the value of voluntary efforts to further the objectives of the law") (citation and internal quotations omitted).

With a record leaving no doubt whatsoever concerning the other two *Gingles* threshold factors, and a proposed majority-black district that was "not materially stranger in shape" than districts previously drawn by the State, *see Jeffers v. Clinton*, 730 F. Supp. at 207, the Louisiana Legislature had ample reason to believe that its congressional plan would be vulnerable to a Section 2 vote dilution challenge if it had refused to create a second majority-black district.[17] If a state with Louisiana's record

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[17] Indeed, during the 1980s, congressional and state legislative districting plans that failed to create majority-minority districts were invalidated in several southern states, including Louisiana, for unlawfully diluting minority voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *See, e.g., Jordan v. Winter*, 604 F. Supp. 807, 813 (S.D. Miss. 1984) (three-judge court) (holding that majority-black congressional district extending most of length of Mississippi River was necessary because, due to racially polarized voting, blacks had "an unrealistic chance . . . to be elected in majority white voting population districts"), *aff'd mem. sub nom. Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984); *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court) (holding Louisiana violated Section 2 of Voting Rights Act by refusing to create majority-black congressional district in New Orleans area); *Jeffers v. Clinton* (invalidating Arkansas legislative redistricting plan

of racial discrimination and electoral exclusion cannot draw a majority-black district closely modeled on prior redistricting plans without awaiting actual litigation under the Voting Rights Act and a court's finding of a violation, then no state could dare to pursue "voluntary efforts to further the objectives of the law." *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring in part and concurring in judgment) (citation and internal quotations omitted).

Further, the same record demonstrates a strong basis for Louisiana's belief that Act 1 was justified as a reasonable effort to assure that its redistricting plan was free of any racially discriminatory purpose, in compliance with Section 5 of the Voting Rights Act. *Wygant*, 476 U.S. at 277; *see Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) (three-judge court) (Section 5 preclearance of congressional redistricting plan denied, despite absence of retrogressive effect, where state had refused to create district in which blacks would constitute a majority), *aff'd mem.*, 459 U.S. 1166 (1983).

2. Act 1 Is Supported by Louisiana's Compelling Interest in Overcoming Past Racial Discrimination and Racially Polarized Voting.

The creation of a second majority-black congressional district was also fully justified as a means to overcome Louisiana's history of racial discrimination in voting practices and the patterns of racially polarized voting in Louisiana that have excluded African-American political representation in majority-white election districts. In a state where severe racially polarized voting prevails, the consequences of drawing only white-majority districts are well understood. In

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under Section 2 because majority-white legislative districts diluted black voting strength).

drawing district lines, a state may reasonably seek to avoid perpetuating past racial discrimination and exclusion of racial minorities from elective office. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (opinion of O'Connor, J.) ("evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a [state or] local government's determination that broader remedial relief is justified"); *id.* at 491 (O'Connor, J.).[18] In light of the substantial showing that racial discrimination has seriously impeded the full participation of African Americans in Louisiana's political life and that race continues to permeate the election process to the detriment of African-American voters and candidates, the creation of a second majority-black congressional district in Act 1 was fully justified as a remedial measure.[19]

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[18] *See also Rogers v. Lodge*, 458 U.S. 613, 623-24 (1982) (lack of black electoral success because of racial bloc voting "bear[s] heavily on the issue of purposeful discrimination"); *UJO v. Carey*, 430 U.S. 144, 167 (1977) (a State is not "powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls") (White, J., joined by Stevens & Rehnquist, JJ.).

[19] The district court clearly erred in asserting that the record lacks "any credible evidence" that the Legislature considered the need to remedy the State's history of racial discrimination when it enacted Act 1. La. J.S. App. 20. There is simply no basis for disputing that the Louisiana Legislature discussed and considered at length the necessity of creating a second majority-black district in 1994 in order to rectify the vestiges of a long history of racial discrimination and to comply with the Voting Rights Act. *See supra* note 3.

B. ***Act 1 is Narrowly Tailored.***

In considering whether Act 1 was narrowly tailored, the district court simply reiterated its objections to the alleged noncompactness of District 4. La. J.S. App. at 21. These objections have already been addressed above, and there is no independent basis for challenging Act 1 as not narrowly tailored. District 4 in Act 1 is directly modeled on past redistricting plans and adheres to customary practices more closely than any other potential majority-black district. The district has only a 54% black voting-age population, does not unnecessarily "pack" black voters, and fully complies with the district court's observation in 1993 that a black voting-age population percentage of 55% would be sufficient to permit black voters to elect a candidate of choice. *Hays I,* La. J.S. App 152.[20] Act 1 serves Louisiana's non-racial redistricting goals and achieves a fair regional and partisan balance.

Moreover, the district court made no finding, and there is no evidence, that white voters in District 4 lack influence on their representative by virtue of the district's configuration, or that there is any racial dimension to the representation that has been afforded to District 4's residents. *See* Report of Dr. David Bositis, Def.-Int. Ex. 1 (1995). Residents of the district, white and black alike, testified that the district has benefited its constituents by

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[20] Acknowledging the force of this evidence, the district court, at the 1994 hearing on Act 1, expressly informed the defendants that it was not necessary for Dr. Engstrom, the Government's expert, to testify regarding racially polarized voting, because the court was already convinced that a district with a 55% black population was necessary to permit black voters an opportunity to elect a candidate of their choice. The district court noted that it would "not entertain any cross-examination to the contrary." Tr. 7/21/94 p.m. at 19 (as Judge Shaw said, "When you strike gold on something, quit digging").

joining persons with common interests, and several plaintiffs admitted that they had no complaints about the representation they have been afforded under Act 1. Gillespie Dep. at 27, 46; Sanders Dep. at 37, 46. *See also* Fontenot Test., 10/30/95 p.m., Tr. 188-89; McCaffrey Test., 10/31/95 a.m., Tr. 247-48; Def.-Int. Ex. 11 (1995), St. Cyr Decl., at 2-3. Indeed, these facts also demonstrate that plaintiffs were unable to demonstrate any injury sufficient to meet their burden of proving standing under *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992).

## III. THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN IMPOSING A PERMANENT REMEDIAL PLAN THAT DEPARTS FROM STATE POLICY AND VIOLATES THE VOTING RIGHTS ACT.

The district court erred in imposing a court-drawn redistricting plan as a permanent remedy without providing the Louisiana Legislature an opportunity to redraw the district. *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978).[21]

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[21] When the State and the defendant-intervenors filed their motions for stay in the district court, the plaintiffs asked the district court to supplement its January 5, 1996, decision by making findings that the State and defendant-intervenors had waived the Legislature's right to redraw its districts, by failing to object to the adoption of a court-ordered remedial plan during the 1996 trial on the constitutionality of Act 1. The plaintiffs provided the district court with an order making such findings, and the court adopted the plaintiffs' order in denying the motions for a stay. Of course, the district court was without jurisdiction to amend its findings because notices of appeal had already been filed. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Further, any "waiver" argument is factually and legally untenable, and cannot be squared with the district court's January 5, 1996 opinion, which addressed the issue on the merits rather than advancing any theory of "waiver." Indeed, the defendants'

Further, even if the court were authorized to impose its own plan without awaiting action by the Legislature or holding a hearing, its plan would still be invalid because it ignores the State's policy choices to a greater extent than is necessary to cure any constitutional defect. *Upham v. Seamon*, 456 U.S. 37, 40-41, 43 (1982).[22]

The district court defended its "remedial" plan based in part on the theory that creating three districts with a 25% or greater black population would provide black voters with "influence" in elections. La. J.S. App. 6 n.17. The proof at trial, however, overwhelmingly refuted any argument that black voters in Louisiana enjoy "influence" over the electoral process in such districts. The old 8th Congressional District was 38% black during the 1980s, yet even plaintiffs' expert, Dr. Weber, described the District 8 representative, Clyde Holloway, as "unresponsive" to black voters. Weber Test., 8/27/92, Tr. 281.

Plaintiff's other expert, Dr. William Allen, conceded that he did not analyze or prove the viability of the "influence" districts, which he nonetheless posited as preferable to the Fourth Congressional District:

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trial evidence directly addressed the many flaws in the district court's 1994 redistricting plan, and a substantial portion of the post-trial brief of the State and defendant-intervenors was devoted to a discussion of those flaws.

[22] The district court's plan is similar to plans the Legislature rejected because they did not achieve a fair regional balance. Accardo Decl., State Ex. 16 (1994), at 12. The court's plan contains no congressional district in the central part of the state centered on the Red River, although Louisiana's redistricting plans included such a district from 1967 through 1990. *See also* Castille Report, U.S. Ex. 3 (1995) at 2. It also combines two incumbents in one district, contrary to state policy.

> Have I attempted to find a Congressional district in which I would maintain that the outcome was determined by the influence vote of black voters? The answer is I have not made the attempt to do that.

Allen Dep. at 185. Dr. Allen also acknowledged that his 25% population figure for black political influence in a congressional district is an "intuitive" figure applicable anywhere, in any congressional district in the country, rather than a figure based on a specific analysis of the circumstances existing in the State of Louisiana. *Id.* at 107, 176-77. Obviously, conjectures about black political influence, supported by no empirical analysis, do not establish that a plan containing districts with a 25% black population affords any influence, much less *optimal* political influence, to black voters in Louisiana. The evidence clearly demonstrated that the district court's plan, which contains no district with a greater than 33% black population outside of District 2, would make it impossible for black voters to elect a candidate of choice to Congress outside of the New Orleans area and would violate the Voting Rights Act. *Jordan v. Winter*, 604 F. Supp. at 811-13.

## CONCLUSION

The Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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# APPENDIX

[filed February 9, 1996]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

---

RAY HAYS, EDWARD L. ADAMS, SUSAN SHAW SINGLETON, GARY STOKLEY, PATRICIA SLOCUM, RICHARD DAVID, BARBARA DAVID, TERRY GILLESPIE, FLOYD GONZALEZ, RICHARD SANDERS, PARKS SANSING, and BOBBY WILLIAMS,

Plaintiffs,

vs.

STATE OF LOUISIANA et al.,

Defendants,

LOUISIANA LEGISLATIVE BLACK CAUCUS,

Defendant-Intervenor.

Civil Action Nos.
CV92-1522S
CV95-1241

Judge Donald E. Walter
Magistrate Judge Roy S. Payne

---

NOTICE OF APPEAL

Notice is hereby given that the defendant-intervenor, Louisiana Legislative Black Caucus, hereby appeals to the United States Supreme Court from the judgment of the United States District Court, Western District of Louisiana (three-judge court), entered on January 5, 1996.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Respectfully submitted,

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[filed February 14, 1996]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

| | | |
|---|---|---|
| RAY HAYS, et al., | : | |
| Plaintiffs, | : | |
| | | Civil Action Nos. |
| vs. | : | 92-1522S, 95-1241 |
| STATE OF LOUISIANA, et al., | : | Judge Walter<br>Magistrate Payne |
| Defendants, | : | |
| vs. | : | |
| THE HONORABLE CLEO FIELDS, et al., | : | |
| Defendant-Intervenors. | : | |

## NOTICE OF APPEAL

PLEASE TAKE NOTICE that defendant-intervenor the Honorable Cleo Fields hereby appeals to the United States Supreme Court from the judgment of the United States District Court, Western District of Louisiana (three-judge court), entered on January 5, 1996.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

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[filed February 16, 1996]

**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF LOUISIANA**
**SHREVEPORT DIVISION**

RAY HAYS, EDWARD L. ADAMS, SUSAN SHAW SINGLETON, GARY STOKLEY, PATRICIA SLOCUM, RICHARD DAVID, BARBARA DAVID, TERRY GILLESPIE, FLOYD GONZALEZ, RICHARD SANDERS, PARKS SANSING AND BOBBY WILLIAMS,

Plaintiffs,

vs.

STATE OF LOUISIANA, *et al.*,

Defendants,

and

BERNADINE ST. CYR, PATRICK FONTENOT, HAZEL FREEMAN, and RALPH WILSON,

Defendant-Intervenors.

Civil Action Nos.
CV92-1522S
CV95-1241

Judge Donald E. Walter
Magistrate Judge Roy S. Payne

**NOTICE OF APPEAL**

Notice is hereby given that defendant-intervenors Bernadine St. Cyr, Patrick Fontenot, Hazel Freeman, and

Ralph Wilson, hereby appeal to the United States Supreme Court from the judgment of the United States District Court for the Western District of Louisiana (three-judge court), entered on January 5, 1996.

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**Nos. 95-1681, 95-1682, 95-1710**

Supreme Court, U.S.
FILED
MAY 23 1996
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

---

STATE OF LOUISIANA *ex rel.* RICHARD P. IEYOUB,
*Appellant,*

v.

RAY HAYS, *et al.*,
*Appellees.*

---

LOUISIANA LEGISLATIVE BLACK CAUCUS, *et al.*,
*Appellants,*

v.

RAY HAYS, *et al.*,
*Appellees.*

---

UNITED STATES,
*Appellant,*

v.

RAY HAYS, *et al.*,
*Appellees.*

---

**On Appeal from the United States District Court for the Western District of Louisiana**

---

## MOTION TO DISMISS OR AFFIRM

---

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36 pp

## QUESTIONS PRESENTED

1. Whether these appeals are moot because Louisiana has repealed the challenged districting plan and adopted the court-ordered plan requested by the plaintiffs.

2. Whether the district court's finding that "race was the predominant factor" driving Act 1 was clearly erroneous.

3. Whether the district court erred when it found insufficient evidence of a compelling interest to justify segregation of Louisiana's voters by race.

4. Whether this Court should consider the appropriateness of the court-imposed plan when (1) such arguments were neither raised nor passed on below and (2) only the permissive intervenors have challenged the district court's remedy in this Court.

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## MOTION TO DISMISS OR AFFIRM

Appellees respectfully request that this Court dismiss these appeals or, in the alternative, affirm the judgment of the three-judge District Court. That judgment for the second time held unconstitutional the Louisiana redistricting scheme set forth in Louisiana Acts 1994, First Extraordinary Session No. 1 ("Act 1").

These appeals are now moot because Louisiana has repealed Act 1, and thereby granted appellees the very relief they sought in this litigation. Indeed, Louisiana has not only repealed the constitutionally-repugnant Act 1, but it has specifically adopted the same redistricting plan ordered by the court below. *See* Louisiana Acts 1996, First Extraordinary Session No. 96 ("Act 96") (reprinted in Second Supp. to Opp. to Pending Applications for Stay, filed May 15, 1996 and attached in pertinent part hereto as Appendix A).

Unsuccessful both in the courts and the legislature, however, the supporters of Act 1 doggedly seek to keep this case alive by asking this Court to issue an advisory opinion reviewing that Act's constitutionality. But this litigation already has been resolved in the democratically optimal fashion—after having its day in court, the state legislature has ratified the court-ordered plan. The courts should seek to encourage such responsible legislative action, not to thwart it.

It would be remarkable, to say the least, for this Court now to punish Louisiana for voluntarily adopting the court-ordered plan. Although the Members of this Court have disagreed over the propriety of federal-court intervention in the redistricting process, all agree that the States, and not the federal courts, should have primary responsibility for that process. What has happened here is the best-case outcome for all concerned: rather than having a federal-court plan imposed on Louisiana by force, the State has decided to adopt that plan voluntarily. The political process has worked. Appellants' attempt to continue fighting their losing war in court must be soundly rejected.

## STATEMENT OF THE CASE

In the three years since this Court's decision in *Shaw v. Reno,* 113 S. Ct. 2816 (1993), the three-judge court below has held *three* trials on the constitutionality of Louisiana's redistricting plans, and has *three times* invalidated Louisiana's plan. The first decision invalidated Louisiana Acts 1992, No. 42 ("Act 42"), which contained the notorious Z-shaped District 4 (the so-called "Zorro" district), which "[t]he State now concedes . . . was bizarre." *Hays II*, La. App. at 65 n.1.

The Louisiana Legislature responded by passing Act 1 guided by the Justice Department's threatened denial of preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The district court invalidated that districting plan, and the United States and Louisiana appealed. After noting probable jurisdiction and hearing argument, this Court held that the plaintiffs challenging Act 1 lacked standing because they did not live in District 4. *United States v. Hays*, 115 S. Ct. 2431 (1995).

On remand, the plaintiffs amended their complaint to add new plaintiffs who resided in District 4 as well as new allegations about District 5, where the original plaintiffs live. Plaintiffs also filed a new and identical action, which was consolidated with the original action. *Hays III*, La. App. at 8. The trial court allowed the Louisiana Legislative Black Caucus, Congressman Cleo Fields, and several residents of District 4 of Act 1 to intervene as defendants (collectively the "permissive intervenors"). The court held another trial on October 30 and 31, 1995, allowing live testimony and witness declarations from all parties. The court's judgment striking down Act 1 and imposing a court-devised plan was entered on January 5, 1996. *Id.* at 39.

### A. The Demise of Act 42 and the Zorro District

In May 1992, "a legislative alliance between the Black and the Republican Caucuses" implemented a race-based approach to redistricting in response to Louisiana's loss of one

seat in the United States House of Representatives. *Hays I*, La. App. at 144 n.54. The result was Act 42 and its 65% black "Zorro" district, which spanned a distance of almost 600 miles. *Id.* at 131. The alliance of forces responsible for Act 42 never denied the controlling role of race; to the contrary, they championed race as the primary *justification* for Act 42. *Id.*

Four residents of Lincoln Parish filed suit to enjoin Act 42 in June, 1992. A three-judge panel convened to hear the case. The court held a two-day evidentiary hearing in August 1992. *Id.* The court denied plaintiffs' request for a preliminary injunction and allowed the 1992 congressional elections to proceed as planned under Act 42—including the "Zorro" District. *Id.* at 108-09. The district court then took plaintiffs' case on the merits under advisement until this Court rendered its judgment in *Shaw*, whereupon the court conducted a second two-day hearing in August 1993.

On December 28, 1993, the court struck down Act 42. *Id.* at 105. In so doing, the court rejected the argument that Section 5 of the VRA required a second majority-black district: "because Louisiana lost a seat in the United States House of Representatives, a plan with one black majority district would satisfy the Section 5 non-retrogression requirement given no more dramatic shift in the statewide ratio of white-to-black voters than is demonstrated by a comparison of the 1980 and 1990 census figures." *Id.* at 150 n.64.

### B. Act 1 Replaces Act 42

While the invalidation of Act 42 was on appeal to this Court, the State convened a special legislative session to prepare a new redistricting plan. Notwithstanding the trial court's earlier admonitions, many legislators "remain[ed] convinced that the Department of Justice would not pre-clear any plan that did not contain two majority/minority districts"—a belief DOJ "encouraged, if not demanded." *Hays II*, La. App. at 69 n.3.

The tacit alliance between the proponents of Act 42 and the Justice Department was very much in evidence during the 1994 special legislative session. On April 20, 1994, with the two chambers of the Louisiana Legislature deadlocked over a new plan, Justice Department officials chose to intervene—albeit indirectly—through a letter of questionable authority to counsel for the Louisiana Legislative Black Caucus. That letter, signed by the Honorable Deval L. Patrick, Assistant Attorney General for the Civil Rights Division, set forth an interpretation of VRA Section 5 and closed by opining that "it remains reasonable to conclude that the Voting Rights Act requires the state to devise a congressional redistricting plan with two black-majority districts." PX 21.[1]

Immediately upon circulation of the Patrick letter, the Louisiana House reversed its prior course and passed a previously-defeated bill creating two majority-minority districts. PX 52 at 1-3. On April 22, the Senate approved the House-passed bill (which modified slightly the Senate's original bill) despite an attempted filibuster. PX 53 at 3-4.

---

[1] Plaintiffs learned during discovery that the Patrick letter was the result of a concerted effort between the Louisiana Legislative Black Caucus and the Department of Justice designed to influence the Louisiana Legislature in a manner analogous to the improper Justice Department contacts exposed in *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995). On April 8, 1994, DOJ official Steve Rosenbaum conferred with counsel to the Black Caucus. Rosenbaum's notes of the conversation state: "Black caucus to send a letter asking for views. Still need for DOJ to do something. How quickly be able to turn it around?" PX 19. On April 11, Rosenbaum conferred again with counsel to the Black Caucus, who told Rosenbaum that "their clients and they as counsel in litigation thought it would be useful for the Department *to state its views publicly* about the application of the Voting Rights Act to Congressional redistricting in Louisiana . . . ." Rosenbaum Dep. vol. I at 114 (emphasis added). On April 15, counsel for the Black Caucus sent the promised letter "asking for views," PX 20, which did not mention the earlier telephone calls. On April 20, Deval Patrick provided the requested advisory opinion to counsel for the Black Caucus. PX 21.

Shortly thereafter, Governor Edwin W. Edwards signed Act 1 into law.

### C. The Court's 1994 Decision Striking Down Act 1

After the State repealed Act 42 and enacted Act 1, this Court remanded to the trial court for consideration of Act 1. *Louisiana v. Hays*, 114 S. Ct. 2731 (1994). On July 6, 1994, plaintiffs filed an amended complaint challenging Act 1.

The district court ordered yet another two-day trial. The record at trial reinforced the inference of intentional racial classification arising from the "bizarre and irregular shape of District Four . . . [which] cuts across historical and cultural divides, splits twelve of its fifteen parishes and divides four of the seven major cities of the State." *Hays II*, La. App. at 65. *See also, Hays I*, La. App. at 131-32. Moreover, "[t]he Senators themselves admitted that race played a large if not dominant role in the map as it is now drawn," the court explained, and "[t]hose persons involved directly with the formation of Act 1 acknowledged that the creation of a second majority-minority district was the specific intent of the Legislature." *Hays II*, La. App. at 65.

The State put forward two race-neutral explanations for its plan: (1) a geographer "testified that District 4 was drawn along the Red River Valley demonstrating a commonality of interest," and (2) witnesses claimed "that District 4 of the plan was modeled after the old eighth district in Louisiana . . . .." *Id.* at 78. The court dismissed these explanations, finding that "[t]he Red River valley theory is clearly a *post hoc* rationalization similar to the Mississippi River theory offered to support Act 42 and equally unbelievable." Similarly, the court found that "[t]he State's purported reliance on District Four's similarity to the 'old Eighth' is mere pretext." *Id.* at 66-67. The court accordingly applied strict scrutiny.

As compelling interests, the State "contend[ed] that [1] incumbency politics, [2] the Voting Rights Act, and [3]

remedying past legal and social or continuing social discrimination justified the racial segregation of voters." *Id.* at 68. The court acknowledged that "[a]dhering to federal anti-discrimination laws and remedying past or continuing discrimination could constitute compelling governmental interests—*if* the State could 'demonstrate a strong basis in evidence for its conclusion that remedial action was necessary.'" *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality opinion)) (emphasis added). Ultimately, the court found that Louisiana had presented no such basis in evidence. *Id.* at 67-69.

The court rejected the State's Section 2 defense because under *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), "[t]he evidence convincingly proves that the State cannot clear the first *Gingles* hurdle"—compactness. *Hays II*, La. App. at 70. Specifically, "[d]espite a minority population of approximately 30%, demographic distribution is simply too diffuse . . . to generate a majority voting age population in any district outside of the Orleans Parish region." *Id.* at 70 n.4.

Finally, the court dismissed Louisiana's contention that Act 1 was otherwise necessary to remedy past or present discrimination. Acknowledging the "sordid history of unconstitutional treatment of black citizens in Louisiana" that remains "indelibly imprinted in our memories," *Id.* at 70-71, 80-82, the court nevertheless concluded that the State had failed to provide "concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures, coupled with specific remedies." *Id.*

The court then formulated and implemented a redistricting plan for Louisiana. The United States and Louisiana appealed. This Court found that because the four plaintiffs did not reside in District 4, they lacked standing to challenge that district. *United States v. Hays*, 115 S. Ct. 2431 (1995).

### D. The Revived Challenge To Act 1

On remand, the plaintiffs responded to this Court's opinion by (1) amending the complaint to add (a) eight new plaintiffs who resided in District 4 and (b) allegations about the intent of the Louisiana Legislature with regard to District 5 of Act 1, where the original four plaintiffs reside; and (2) filing an identical original action on behalf of all twelve plaintiffs, which the trial court consolidated with plaintiffs' amended action.

The parties stipulated the admission of the record of prior proceedings, and undertook discovery. That discovery and the plaintiffs' presentation at a two-day trial on October 30 and 31, 1995, convinced the trial court that this case is factually "on all fours" with *Miller v. Johnson*, 115 S. Ct. 2475 (1995). *Hays III*, La. App. at 12 n.33.

Consistent with *Miller*, the court found that "race was the predominant factor behind the Legislature's determination to draw a district map with two of seven districts being majority-minority" and that "race was the predominant factor driving the configuration of District 4." *Compare Hays III*, La. App. at 17 *with Miller*, 115 S. Ct. at 2488. The court based its findings on the evidence adduced during the entire litigation, including the plaintiffs' showings regarding "the shape of the district . . . 'in conjunction with its racial and population densities.'" *Hays III*, La. App. at 14. For example, the court credited plaintiffs' demonstration that "even down to the precinct level, the State considered only race in determining which pockets of voters to pull in and which pockets of voters to push out." *Id.* at 14; PX 14-2A; Weber Test., 10/30/95 Trial Tr. at 85-87.

Beyond this circumstantial evidence of racial gerrymandering, the court found direct evidence independently sufficient to subject Act 1 to strict scrutiny. *Hays III*, La. App. at 15. For example, "the cartographer charged with creating Act 1's districts readily admits that, in creating District 4, he concentrated virtually exclusively on racial demographics and

considered essentially no other factor except the ubiquitous constitutional 'one person-one-vote' requirement." *Id.*

The court further found that the Justice Department's role in Louisiana paralleled its role in Georgia, making the Louisiana Legislature "justifiably convinced that the United States Department of Justice would preclear no redistricting plan for Louisiana that failed to include a second majority-minority district." *Id.* The court pointed to the April 20, 1994 Deval Patrick letter (discussed above at 4) as the source of that belief. *Id.*; PX 21. In the court's view, "[t]he State's desire to comply with the Department's policy only reinforces the conclusion that the Legislature knowingly allowed race to become the predominant factor driving the enactment of Act 1." *Hays III*, La. App. at 16. The court concluded: "by demanding a maximization of majority-minority districts the Justice Department impermissibly encouraged—nay, mandated—racial gerrymandering." *Id.*

In rebuttal, the defense again offered three supposedly race-neutral justifications, each entirely inconsistent with the others: "(1) the boundaries were intended to coincide with the lines of Louisiana's 'Old Eighth' district; (2) the District as designed to follow the Red River; and (3) the District is actually majority-poor, rather than majority-black." *Id.* The court found the last two justifications to be "patently post-hoc rationalizations." *Id.* As for the "Old Eighth" justification, the court found it to be "equally spurious, albeit slightly less obvious." *Id.* The court determined that the old district "was used as a guise for amassing a large percentage of minority voters into one district, not as a means of following traditional district boundaries" *Id.* at 17. As a result, any examination of the Old Eighth merely "reinforces the conclusion that race motivated the design of District 4." *Id.* The court readopted its earlier finding in *Hays II* that the "Old Eighth" justification was "mere pretext." La. App. at 5 n.16.

As potentially compelling interests, the defense offered (1) compliance with the Voting Rights Act and (2) the

remediation of generalized past discrimination. Regarding the former, the court concluded that "federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Id.* at 18 (quoting *Miller*, 115 S. Ct. at 2490-91). Applying the factors in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the court again found that "the evidence convincingly proves that the State cannot clear the first *Gingles* hurdle"— compactness. *Hays III*, La. App. at 19. The black population outside of the majority-black District 2, the court concluded, "is so widely and evenly dispersed that, to create a congressional district that meets the one-person-one vote criterion and has even a simple majority black population, resort must be had to graphic design that constitutes racial Rorschach-ism." *Id.*

The court similarly rejected the claim that the evidence in the record of past discrimination against African Americans could constitute a compelling interest justifying the segregation of Louisiana voters. The court acknowledged that there is "a significant state interest in eradicating the effects of past racial discrimination." *Id.* at 20 (quoting *Miller*, 115 S. Ct. at 2490), but found that the defense failed to show "lingering effects of past discrimination in current voting laws and procedures. Neither have they provided *any credible evidence* that the Legislature considered this motivation when it adopted Act 1." *Hays III*, La. App. at 20 (emphasis added). The court thus concluded that "[g]eneralized societal 'remedying' of past discrimination can never meet the Supreme Court's requirement of particularized solutions for specifically identifiable vestiges of past discrimination." *Id.* (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)).

### E. Post-Trial Proceedings and Legislative Ratification of the Court Plan

In striking down Act 1, the trial court found that the State had "persisted in defending the indefensible" and that there was "no basis for believing that, given yet another

chance, [Louisiana] would produce a constitutional plan." *Hays III*, La. App. at 23. At plaintiffs' request, the court accordingly revived the same plan it had imposed in the earlier challenge to Act 1.

Significantly, none of the defense parties ever asked for a hearing on the issue of remedy or challenged the Court's authority to implement a plan of its own design or, more specifically, the 1994 court-ordered plan sought by plaintiffs. Only *after* the court's decision—more than a month after judgment and three months after trial—did the defendants move for a stay, arguing for the first time, *inter alia*, that the court should have held a hearing on the issue of remedy. Not surprisingly, the district court ruled that any challenge to its remedy had been waived, along with the claim that the court-ordered plan violated the Voting Rights Act. *See* La. App. at 54-55. The appellants reiterated the same arguments in their pending applications for stay in this Court.

Later, Louisiana Governor Mike Foster put ratification of the court-ordered plan on the agenda of a special session of the Louisiana Legislature to be convened on March 19, 1996. Both houses of the Louisiana Legislature subsequently adopted the court plan, which became law as Act 96 on May 13, 1996. *See* Appendix A.

## GROUNDS FOR DISMISSAL OR AFFIRMANCE

Appellants essentially ask this Court to issue an advisory opinion regarding the constitutionality of Act 1, a plan that Louisiana has now repealed. Louisiana already has held two congressional elections with unconstitutional racially-gerrymandered districts. After *four* trials and *three* judicial opinions invalidating previous plans, the citizens of Louisiana, acting through their elected representatives, have chosen to settle this litigation. That settlement effort should not be thwarted by protracted litigation over a repealed plan. Accordingly, this Court should either dismiss these appeals or summarily affirm on the merits.

## I. THE COURT SHOULD DISMISS THE APPEALS

The constitutionality of Act 1 is of purely academic interest in light of the Louisiana Legislature's repeal of Act 1 and enactment of Act 96. Regardless of any decision by this Court on the constitutionality of Act 1, the districts imposed by the trial court will remain in effect. Were this Court to note probable jurisdiction, any resulting opinion therefore would be wholly advisory. Moreover, because "the party seeking relief from the judgment below caused the mootness by voluntary action," the State "voluntarily forfeited [its] legal remedy by the ordinary processes of appeal . . . thereby surrendering [its] claim to the equitable remedy of vacatur." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 391-92 (1994). The Court therefore should dismiss the appeals and leave in place the judgment below.

### A. Act 96 Renders The Appeals Moot

Act 96, which simultaneously repeals Act 1 and enacts "the congressional redistricting plan contained in Ray Hays, et al. v. State of Louisiana, et al." in its place, became law on May 13, 1996. *See* Appendix A. Act 96 therefore provides the relief plaintiffs have sought all along. In the complaint, the plaintiffs asked the Court to "[d]evise and implement a lawful, court-ordered congressional districting plan." Complaint, Prayer for Relief ¶ 5. At trial, the plaintiffs asked the Court more specifically to implement "the very same plan that it did once before." 10/31/95 Trial Tr. at 293. *See also* Plaintiffs' Post Trial Br. at 1 ("Accordingly, this Court should again strike down Act 1 and place in its stead the constitutional plan as adopted by the Court in 1994"). By remedying its earlier unconstitutional action and complying with plaintiffs' repeated requests, the State mooted these appeals. *See Commissioner v. Shapiro*, 424 U.S. 614, 623 n.7 (1976) (challenge to timeliness of service of notice of deficiency mooted by timely service of new notice of deficiency).

In *Crowell v. Mader*, 444 U.S. 505 (1980), this Court was presented with the same situation. The district court there

had invalidated a redistricting plan in Tennessee, and had enjoined the State "from conducting any elections pursuant to that plan." *Id.* at 505. After the State appealed, the appellees informed the Court that the State had enacted a new plan; the appellees further argued that the new plan mooted the State's appeal from the injunction against the old plan. This Court agreed, and dismissed the appeals. *Id.* at 506. The same disposition of the appeals should hold here.

It does not matter for present purposes that Louisiana is a covered jurisdiction under the Voting Rights Act. The court-ordered plan, of course, is not subject to Section 5 because it is "perfectly clear" that "the Act's preclearance requirement does not apply to plans prepared and adopted by a federal court to remedy a constitutional violation." *McDaniel v. Sanchez*, 452 U.S. 130, 138 (1981); *Connor v. Johnson*, 402 U.S. 690, 691 (1971) ("a decree of the United States District Court is not within the reach of Section 5 of the Voting Rights Act."). As of January 5, 1996, therefore, the only enforceable congressional districting plan in Louisiana was the court-ordered plan. *Hays III*, La. App. at 40.

Accordingly, contrary to the permissive intervenors' suggestion, *see* Reply in Further Support of Applications for Stay at 2, filed April 29, 1996, Act 96 is not subject to the preclearance requirements of Section 5. Even if Act 96 were simply a legislatively-devised plan rather than a judicial plan, preclearance would not be necessary because Act 96 does not constitute a *change* in voting procedures from the appropriate baseline. Simply put, Act 96 is no different from the enforceable court-ordered plan that was in effect immediately before it became law. Although this Court has interpreted Section 5 broadly to apply to "any state enactment which alter[s] the election law of a covered State *in even a minor way*," *Allen v. Board of Elections*, 393 U.S. 544, 566 (1969) (emphasis added), nothing in the Voting Rights Act or this Court's decisions requires Section 5 procedures for state action that indisputably does *not* change currently effective voting

procedures *at all*. Surely the Voting Rights Act does not prevent a State from enforcing the voting procedures it has been *ordered* to follow by a three-judge federal court as a remedy for a constitutional violation.

This conclusion comports with the purposes of the Voting Rights Act. Section 5 was designed to prevent covered States from keeping one step ahead of the law by "enacting new and slightly different requirements with the same discriminatory effect" once old laws were stricken down. *Allen*, 393 U.S. at 548. There is no such concern here. The plan now in place does not require preclearance because it was devised and implemented by three federal judges intimately familiar with Louisiana's culture and history as a remedy for a constitutional violation. *Cf. McDaniel*, 452 U.S. at 138 (court-imposed plan that was devised and submitted to court by legislature is subject to Section 5 procedures). The court below ensured that the plan would not be retrogressive, *see Beer v. United States*, 425 U.S. 130 (1976); moreover, the court surely did not harbor any unconstitutionally discriminatory intent against minority voters. The legislature's decision to implement the court's plan perforce is not motivated by an intent to discriminate against minority voters, but instead by an intent to settle the litigation and remedy an earlier constitutional violation by the State. The State has not thereby thwarted Section 5, but instead has put itself in the same position as if it had chosen not to appeal.

In summary, Act 96 moots the appeals because this Court can no longer provide meaningful relief to the appellants. Even if this Court were to reverse the court-ordered plan as appellants request, Act 96—the same plan—would remain federally-enforceable state law. Accordingly, this Court should dismiss these appeals. *See United States v. Evans*, 213 U.S. 297 (1909) (statute cannot allow federal court to consider appeal by government from judgments of acquittal because appellate court cannot undo a ruling of acquittal).

### B. This Court Should Not Vacate The Judgment Below

Appellees request that the Court not vacate the judgment below. Vacatur of the lower court's judgment is not granted as a matter of course when this Court dismisses an appeal as moot. *See, e.g., Voltaggio v. Caputo*, 371 U.S. 232 (1963); *Matthews v. Little*, 397 U.S. 94 (1970); *Minnesota Newspaper Ass'n, Inc. v. Postmaster General*, 488 U.S. 998 (1989). A party seeking review who is "frustrated by the vagaries of circumstance" need not "be forced to acquiesce in the judgment"; but when a losing party to the litigation voluntarily moots the case, the circumstances do not justify the equitable remedy of vacatur. *U.S. Bancorp*, 115 S. Ct. at 393. The State therefore is much in the same position as if it had foregone the right to appeal altogether, or had withdrawn the appeal after filing its notice of appeal and jurisdictional statement. *See Karcher v. May*, 484 U.S. 72, 83 (1987).[2]

In any event, even if this Court were to vacate, it should not order that the entire case be dismissed. Where other issues such as calculation of a reasonable attorney's fee remain to be determined, vacatur is "without prejudice to such further proceedings in the District Court as may be appropriate." *Crowell*, 444 U.S. at 506. *See also Maher v. Gagne*, 448 U.S. 122, 129 (1980) (party who prevails through settlement entitled to fees under § 1988).

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[2] The Louisiana Attorney General's office apparently believes that Act 96 requires preclearance. *See New Remap to Become Law*, New Orleans Times-Picayune, May 14, 1996, at A10. Were this Court to vacate the judgment below without clearly stating that preclearance is not required, further litigation might result if the Louisiana Attorney General follows such a course and DOJ (a losing party in this litigation) denies preclearance pursuant to its "maximization policy" in an attempt again to force Act 1 on the citizens of Louisiana.

## II. THE COURT DID NOT CLEARLY ERR WHEN IT SUBJECTED ACT 1 TO STRICT SCRUTINY

If this Court reaches the merits, it should summarily affirm the judgment below. The district court applied the proper legal standard and found that "the plaintiffs have decisively established that race was the predominant factor" behind the districts of Act 1. *Hays III*, La. App. at 17. The court further concluded that Act 1 was unsupported by any compelling interest. Under *Miller*, the findings below are amply supported.[3] Although the appellants claim that the drafters of Act 1 employed "a judicious and proper balancing of the many factors appropriate to redistricting," U.S. J.S. at 13, the court did not clearly err in holding otherwise.

### A. The Trial Court's Finding That "Race Was The Predominant Factor" Driving Act 1 Is Not Clearly Erroneous

Contrary to the State's assertions, the court below did not hold that "any intentional creation of a majority-black election district renders a state's congressional redistricting plan constitutionally suspect." La. J.S. at 8. Nor is the court's holding merely a "rephras[ing]" of its earlier opinion. Intervenor J.S. at 13. Instead, the court's judgment was grounded firmly in *Miller* and record evidence that the State harbored an unconstitutional discriminatory intent. The trial court therefore properly held that the legislature "subordinated traditional race-neutral districting principles—such as compactness, respect for commonality of interests, and respect

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[3] The intervenors' challenge to plaintiffs' standing, which occupies only a sentence of their brief, Intervenor J.S. at 27, deserves only a brief mention here. It is undisputed that eight of the plaintiffs live in District 4, the primary focus of this challenge to Act 1. *Hays III*, La. App. at 10. Moreover, after remand, plaintiffs added allegations to the complaint and produced evidence of the legislature's race-based intent with regard to District 5, where the original four plaintiffs live. Therefore, "[a]s residents of [the challenged districts], all appellees had standing." *Miller*, 115 S. Ct. at 2485.

for political subdivisions—to enact a plan containing a second majority-minority district" *Compare Hays III*, La. App. at 13 *with Miller*, 115 S. Ct. at 2488. That factual finding must be upheld unless clearly erroneous. *Hernandez v. New York*, 500 U.S. 352 (1991); *Rogers v. Lodge*, 458 U.S. 613 (1982).

**1. Circumstantial evidence of racial intent**

The court's finding is amply supported by circumstantial evidence that the legislature subordinated all traditional districting principles to racial considerations. In each instance, the evidence showed (1) a substantial disregard for traditional districting principles, *see Miller*, 115 S. Ct. at 2497 (O'Connor concurring); and (2) subordination of those principles to racial considerations, *Miller*, 115 S. Ct. at 2488.

**Compactness:** The plaintiffs presented evidence that District 4 of Act 1 is the least geographically compact district in the history of Louisiana. Their expert, Dr. Ronald Weber, presented two statistical measures of geographic compactness—the dispersion score and the Max Aspect score. On the dispersion score, District 4 of Act 1 was less compact than any district in Louisiana history with the exception of the predecessor of a New Orleans district ultimately invalidated under the Voting Rights Act as a racial gerrymander. PX 14-8A-G; *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983). The Max Aspect score showed Act 1's District 4 to be the least compact district in Louisiana history. This departure from Louisiana's past practice was explained by the legislature's desire to connect the black neighborhoods of the four major cities outside New Orleans in a single district. The legislature could not have created a second black-majority district otherwise since nearly 58% of the black citizens (53% of the black registered voters) in District 4 resided in these four cities.

And the mapmaker of Act 1 admitted that the purpose of going to each of these cities was to "capture" a "dense black population." Koepp Dep. at 76, 88, 90.

**Respect for political subdivisions:** Plaintiffs showed, among other things, that Act 1's District 4 divided twelve of its fifteen parishes—the most "fundamental unit[s] of societal organization in the history of Louisiana. . . .." *Hays I,* La. App. at 132. District 4's twelve split parishes constituted: (1) *three times* more split parishes (previous maximum—four) than any single previous congressional district; *see* PX 3; 1994 USX 8 at Table 1; and (2) almost *twice* as many split parishes (previous maximum—seven) as any *entire congressional districting plan* in Louisiana history. Similarly, Act 1 split *seventeen* cities and towns—*fourteen* strung along District 4's borders. District 4 alone splits four major cities (Shreveport, Alexandria, Lafayette and Baton Rouge), three of which never have been split in Louisiana history.

If further proof were needed, the evidence revealed that the legislature *consistently* divided parishes by placing most *black* registered voters (more than 82% of blacks in split parishes) in District 4, while placing most *white* voters (nearly 77% of whites in split parishes) in the neighboring predominantly white Districts (3, 5, 6, and 7). Likewise, in each split city, areas with large *black* majorities (73% to 80%) were placed into District 4 while areas with even larger *white* majorities (83% to 88%) were placed into in Districts 5, 6 and 7. *See* PX 4.

**Shared communities of interest:** Plaintiffs' expert opined that "District 4 in Act 1 contains a broad array of agricultural, economic, cultural, and other interests and . . . cannot be explained as an attempt to bring together persons sharing common interests other than race." PX 14 at 6. The district court agreed, and further concluded that the result of this artificial joining of diverse interests was due to racial considerations. *Hays III*, La. App. at 13. As in *Miller*, "there are no tangible 'communities of interest' spanning the hundreds of miles" of District 4. 115 S. Ct. at 2490. Although the United States may disagree and argue that there was

evidence that "District 4 was designed to combine persons with common interests," U.S. J.S. at 14, that disagreement does not make the court's findings clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

**2. Direct evidence of racial intent**

The plaintiffs also presented direct evidence of racial purpose. The court found that Glenn Koepp, the mapmaker of Act 1 "readily admits that, in creating District 4, he concentrated virtually exclusively on racial demographics and considered essentially no other factor . . . .." *Hays III*, La. App. at 15. Koepp testified that he used computer software called "Plan Builder" that kept running tallies of demographic statistics. Koepp Dep. at 21. Koepp testified that he used only racial information in devising the tortuous boundaries of Act 1:

Q: [W]hat were the windows that were up while you were drawing the districts in Act 1?

A: The one we talked about earlier with the data on it.

Q: So total population by race, —

A: Yeah.

Q: — voting age population by race, —

A: Yes.

Q: — and the voter registration by data by race?

A: Right, right.

Q: Was there anything on your screen about compactness?

A: No.

Q: Was there anything on your screen about contiguity?

A: I did not turn contiguity on, but there is— there was the option of turning it on.

Q: Okay. Was there any socio-economic data on the computer?

A: No.

Q: Was there any list of the number of parishes that were split?

A: No.

Q: Or municipalities?

A: No.

Q: But there was the one man-one vote up on the screen?

A: [A]bsolutely.

Q: Is there any capability of the program to measure communities of interest?

A: No.

Koepp Dep. at 78-79; *see also id.* at 31-32, 39-40. Although the appellants would interpret Koepp's testimony differently, U.S. J.S. at 15, La. J.S. at 10-12, their disagreement does not make the district court's findings clearly erroneous.

The role that race played was, of course, foreordained by the Justice Department's involvement. Thus, legislators who participated in the debate over Act 1 believed that a second majority-minority district outside of New Orleans was required by DOJ's "policy of maximizing majority-black districts." *Miller*, 115 S. Ct. at 2492. Although Louisiana had not been denied preclearance for a congressional plan with only one majority-black district, the Deval Patrick letter, which broke the log-jam in the Louisiana House, loudly proclaimed DOJ's maximization policy. It therefore became clear to the legislature that "the Justice Department wanted two minority districts regardless." Adley Test., 10/30/95 Trial Tr. at 21. The

State did not contest this; to the contrary, one of its own legislative witnesses testified in writing to his belief at the time that a plan with fewer than two majority-black districts would not "receive preclearance by the United States Justice Department." 1994 SX 16 ¶ 6.

### B. The Court Below Properly Rejected The State's Pretextual Race-Neutral Justifications

The trial court properly allowed the defense a full opportunity to present race-neutral explanations for Act 1. *See Miller*, 115 S. Ct. at 2488 ("Where . . . race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can 'defeat a claim that a district has been gerrymandered on racial lines.'"). Two of these race-neutral explanations—that District 4 purposely followed the Red River and that District 4 was designed as a poor district rather than a black district—were summarily rejected because there was no evidence that the legislature actually was motivated by these considerations. Indeed, the defense never presented its "socio-economic" argument in earlier proceedings on Act 1, and there was no evidence that District 4's boundaries were guided by a desire to group persons with economic similarities, or that the mapmaker even had access to such information. The appellants apparently now have abandoned the "Red River" justification, presumably because the mapmaker of Act 1 conceded that he did not intend to draw District 4 along the Red River. Koepp Dep. at 85-86.

The only remaining supposedly race-neutral justification advanced by the State is that District 4 is similar to the Old Eighth district under past districting plans. But the state's own evidence showed that the mapmaker "was asked to look at the old Eighth District" precisely because it was "the highest minority population district in the state other than the minority district number two." 7/21/94 Trial Tr. vol. 2 at 11. From that point on, parishes and parish parts were added or subtracted, always with the apparent aim of racial segregation.

The end result departed dramatically from any of the many versions of the "old Eighth." No previous configuration of the "old Eighth" ever split more than four parishes; District 4 split twelve. *See* PX 3. Likewise, no version of the "old Eighth" ever included fewer than twelve *full* parishes; District 4 included only three. *Id.*

Plaintiffs' expert, Dr. Ronald Weber, buttressed the Court's earlier findings with his testimony in the latest trial. His analysis showed that District 4 of Act 1 is more similar to the Zorro District than it is to any of the prior configurations of the Old Eighth. After comparing the overlap of population between the Old Eighth and District 4, Dr. Weber testified that "even though it might look on the map like there was some commonality between district, old District 8 and new District 4 in Act 1, the population analysis does not reveal that." 10/30/95 Trial Tr. at 107. Weber concluded that District 4 includes no more than 37.7% of the population of any prior version of the Old Eighth, *id.* at 108, with the population overlap in one case being as low as 18%. PX 14-10A. In contrast, a remarkable 54% of District 4's population came from the Zorro District, which was anchored by the black neighborhoods in the same four major cities split by District 4 of Act 1. PX 14-10B.

In sum, the court properly found that the "Old Eighth" justification was "mere pretext." *Hays II*, La. App. at 67. Based on the evidence before it, then, the court had little choice but to find that race was the "predominant factor" driving Act 1. That finding is not clearly erroneous, and should be upheld by this Court.

## III. THE COURT DID NOT ERR IN REJECTING THE STATE'S PURPORTED COMPELLING INTERESTS

Applying strict scrutiny, the court properly recognized that Act 1 could be upheld only if "narrowly tailored to achieve a compelling governmental interest." *Hays III*, La. App. at 17. The defendants argued that Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as well as amorphous claims of past discrimination, could serve as compelling interests in support of Act 1. The court properly held that neither of these purported interests could justify Act 1.

### A. The Voting Rights Act Did Not Compel The Race-Based Districting of Act 1

The Voting Rights Act can provide a justification Act 1's race-based districting only if Act 1 is "reasonably *necessary* under a constitutional reading and application" of the Voting Rights Act. *Miller*, 115 S. Ct. at 2491 (emphasis added). Under the familiar standard of *Gingles*, a Section 2 plaintiff must show that (1) minority voters tend to vote as a bloc; (2) the majority consistently votes as a bloc to defeat candidates preferred by the minority; and (3) there is a geographically compact minority population sufficient to constitute a majority in a single district. *Gingles*, 478 U.S. at 50-51.

The district court properly concluded that the Voting Rights Act did not compel the creation of a district that is geographically less compact than any other district in Louisiana history. *See supra* at 16. Although the appellants attempt to argue that the district court failed to measure the compactness of District 4 against other Louisiana districts, U.S. J.S. at 16-17, Intervenor J.S. at 21, La. J.S. at 18, the district court actually made just that comparison. *Hays III*, La. App. at 14. To counter plaintiffs' statistical proof, the defense relied on nothing but the self-serving testimony of the mapmaker of Act 1 to the effect that District 4 is compact because

"compactness is in the eye of the beholder." Koepp Test., 7/22/94 Trial Tr. at 90.

"Compactness" under *Gingles*, however, is a question of fact, *Westwego Citizens for Better Gov't v. Westwego*, 906 F.2d 1042, 1046-47 (5th Cir. 1990), and the district court did not clearly err by accepting (1) the statistical evidence presented by the plaintiffs showing that District 4 is not geographically compact by Louisiana standards, *see supra* at 16; (2) evidence showing that District 4 could amass a majority black population only by joining the black neighborhoods of four major cities scattered across the State, PX 14;[4] and (3) the defense's own expert, who presented evidence that District 4 spans a greater distance than any other district in Louisiana history. 1994 USX 8 at Table 1. Because Section 2 does not clearly compel creation of such a district, the trial court properly rejected any contrary interpretation and its attendant constitutional problems. *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988).[5]

### B. Amorphous Claims of Past Discrimination Cannot Justify Act 1

Appellants claim that "Louisiana in this case had a compelling interest in ameliorating the effects of racial bloc voting attributable to past and present governmental and private discrimination." U.S. J.S. at 17, Intervenor J.S. at 24-25, La. J.S. at 19-21. But a State cannot insulate

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[4] On similar facts, the district court in *Johnson v. Miller*, 864 F. Supp. 1354, 1389, *aff'd*, 115 S. Ct. 2475 (1995), found that "[t]he populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties . . . ." There, as here, "DOJ's insistence that they are 'compact' renders the term meaningless." *Id.*

[5] Although the district court did not reach the other *Gingles* factors, plaintiffs introduced evidence of remarkable success for black-preferred candidates in senatorial, gubernatorial, and congressional elections in the years preceding trial. PX 14-4Q-T, 14-4W, 14-6.

discriminatory action from review simply "by conceding that [it] discriminated in the past, now that it is in [its] interest to make such a concession." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 n.5 (1986) (plurality opinion). And as for racially-polarized voting, not only was there no finding below, but there was no reason to reach the issue in light of the court's dispositive finding that Act 1 failed *Gingles'* first precondition. Nor was there proof that any racially-polarized voting was "*attributable to* past and present governmental and private discrimination," U.S. J.S. at 17, or that gerrymandered districts would cure such polarization.

The district court therefore properly recognized the lack of any "concrete evidence of the lingering effects of past discrimination in voting laws and procedures." *Hays III*, La. App. at 20. Moreover, the court found that there was no credible evidence that the legislature was actually motivated by this desire when it passed Act 1. As in *Miller*, "there is little doubt that the State's true interest in designing the [] District" was not remedying past discrimination but instead was "creating a [] majority-black district to satisfy the Justice Department's preclearance demands." 115 S. Ct. at 2490.

Appellants seize upon an apparently approving reference in a plurality opinion to the "fair allocation of political power between white and nonwhite voters." *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 167 (1977) (plurality opinion). Subsequent decisions, however, have condemned racial *group* remedies under the Voting Rights Act except where a minority is "essentially . . . shut out of the political process." *Davis* v. *Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor concurring). And far from creating remedies beyond the Act, recent decisions hold that a Section 2 claim may not exist even where all three *Gingles* criteria are satisfied. *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2663 (1994); *Nipper v. Smith*, 39 F.3d 1494, 1512 (11th Cir. 1994) *(en banc), cert. denied*, 115 S. Ct. 1795 (1995). By contrast,

appellants' expansive additional remedy would make *Gingles'* requirements superfluous.

In sum, the district court properly found that Act 1 could not survive strict scrutiny. Because racial classifications deserve "the most searching judicial inquiry," *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995), the court properly held that the evidence here did not make out a compelling state interest justifying Act 1.

## IV. THE COURT'S REMEDIAL PLAN WAS PROPER

The permissive intervenors alone argue that "the district court exceeded its authority in imposing a permanent remedial plan that departs from State policy and violates the Voting Rights Act." Intervenor J.S. at 27-29. They further argue that the court should not have imposed the remedy "without providing the Louisiana Legislature an opportunity to redraw the districts." *Id.* at 27.[6] This Court should reject these arguments because none of them was raised or passed on below, La. App. at 54-55, and because the United States and the State have not raised these arguments even here. This case therefore is entirely unsuitable for this Court's review either along with or after decision in *Abrams v. Johnson*, Nos. 95-1425 and 95-1460, *probable jurisdiction noted*, __ S. Ct. __ (May 20, 1996).

Nor do any of these arguments have merit, assuming they were not waived. The court plan is fully consistent with Louisiana policy, as evidenced by the speedy passage of Act 96. Moreover, any suggestion that the court plan actually violates the Voting Rights Act requires more careful analysis than a calculation of the percentage of majority-black districts, Intervenor J.S. at 29, U.S. J.S. at 17, 18, especially when the

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[6] The United States and Louisiana apparently have abandoned on appeal any argument about the propriety of the remedy implemented by the district court. The United States claims only in a passing reference that the court plan allegedly violated Section 2 of the Voting Rights Act. U.S. J.S. at 17 n.2.

court below found (based on expert testimony presented by the plaintiffs) that "our plan, with its one black majority and three influence districts, empowers more black voters statewide than does Act 1's plan." *Hays III*, La. App. at 6 n.17.

## CONCLUSION

For the foregoing reasons, the appeals should be dismissed as moot. In the alternative, the judgment below should be affirmed.

Respectfully submitted,

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# APPENDIX

# APPENDIX A
## Act 96 [EXCERPTED]

First Extraordinary Session, 1996

HOUSE BILL NO. 49

BY REPRESENTATIVES BRUNEAU, MCCALLUM, LANCASTER, SCALISE, AND WALSWORTH AND SENATORS GREENE, DARDENNE, AND HOLLIS

AN ACT

To enact R.S. 18:1276.1 and to repeal R.S. 18:1276, to adopt the congressional redistricting plan contained in Ray Hays, et al. v. State of Louisiana, et al.; to provide for the redistricting of the seven congressional districts according to the congressional redistricting plan contained in Ray Hays, et al. v. State of Louisiana, et al.; to provide for the terms of members of congress currently serving; to provide for filling certain vacancies; to provide for effective dates; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. The Legislature of Louisiana adopts as its own the congressional redistricting plan for the state of Louisiana ordered by the United States District Court, Western District of Louisiana, Shreveport Division in the case of Ray Hays, et al. v. State of Louisiana, et al., Nos. 92-1522 and 95-1241.

Section 2. R.S. 1:1276.1 is hereby enacted to read as follows:

§1276.1. Congressional districts

* * * * *

Section 3. R.S. 18:1276 is hereby repealed in its entirety.

Section 4. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

/s/

SPEAKER OF THE HOUSE OF REPRESENTATIVES

/s/

PRESIDENT OF THE SENATE

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____

This bill having been submitted to the Governor and no action having been taken within the time provided by the Constitution, said bill becomes law without his approval.

Supreme Court, U.S.
FILED
JUN 11 1996
CLERK

(4) (3) (B)

Nos. 95-1681, 95-1682 and 95-1710

# In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF LOUISIANA, ET AL., APPELLANTS

*v.*

RAY HAYS, ET AL.

LOUISIANA LEGISLATIVE BLACK CAUCUS, ET AL., APPELLANTS

*v.*

RAY HAYS, ET AL.

UNITED STATES OF AMERICA, APPELLANT

*v.*

RAY HAYS, ET AL.

*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA*

## BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

DREW S. DAYS, III
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

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# In the Supreme Court of the United States

OCTOBER TERM, 1995

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No. 95-1681

STATE OF LOUISIANA, ET AL., APPELLANTS

*v.*

RAY HAYS, ET AL.

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No. 95-1682

LOUISIANA LEGISLATIVE BLACK CAUCUS, ET AL., APPELLANTS

*v.*

RAY HAYS, ET AL.

---

No. 95-1710

UNITED STATES OF AMERICA, APPELLANT

*v.*

RAY HAYS, ET AL.

---

*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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1. Appellees contend (Mot. to Dis. 11-13) that the appeals in this case are moot because Louisiana has recently enacted legislation (Act 96) that repeals Act

1 and adopts the district court's remedial redistricting plan. Act 96, however, has not been precleared under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Unless and until it is precleared, Act 96 is not effective as law. *Clark* v. *Roemer*, 500 U.S. 646, 652-653 (1991). As the Court explained in *Clark*:

> Section 5 requires States to obtain either judicial or administrative preclearance before implementing a voting change. A voting change in a covered jurisdiction "will not be effective as la[w] until and unless cleared" pursuant to one of these two methods.

*Ibid.* Because Act 96 is not effective as law, it cannot affect the viability of the present appeals.

Appellees contend (Mot. to Dis. 12) that Act 96 is not subject to Section 5 preclearance because it does not constitute a "change" in the State's voting practices. As the text of Section 5 makes clear, however, an unprecleared voting practice is a "change" subject to preclearance when the practice is "different from that in force or effect on November 1, 1964." 42 U.S.C. 1973c. See 28 C.F.R. 51.2. Since Act 96's redistricting plan is different from the redistricting plan that was in effect on November 1, 1964, Act 96 must be precleared under Section 5.

Appellees contend (Mot. to Dis. 12-13) that preclearance may be avoided because court-ordered plans are not subject to preclearance under Section 5 and Act 96 adopts a court-ordered plan. That contention is incorrect. Under this Court's decision in *McDaniel* v. *Sanchez*, 452 U.S. 130, 153 (1981), the preclearance requirement applies whenever a redistricting plan "reflect[s] the policy choices of the elected representatives of the people—no matter what

constraints have limited the choices available to them." Act 96 clearly reflects the policy choices of Louisiana's elected representatives. It is therefore subject to the preclearance requirement under *McDaniel*, even though the same redistricting plan was not subject to preclearance when the district court ordered it into effect.

The Senate Report accompanying the 1975 extension of Section 5, which was cited by the Court in *McDaniel*, 452 U.S. at 148-149, leaves no doubt that Congress intended to require preclearance of legislation that adopts a court-ordered plan. It states that:

> The one exception where Section 5 review would not ordinarily be available is where the court, because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant. This is the limited meaning of the "court decree" exception recognized in *Connor* v. *Johnson*, 402 U.S. 690 (1971). Even in these cases, however, if the governmental body subsequently adopts a plan patterned after the court's plan, Section 5 review would be required.

S. Rep. No. 295, 94th Cong., 1st Sess. 18-19 (1975) (citation omitted).

Because Act 96 has not been precleared and is not legally effective, the appeals from the district court's judgment invalidating Act 1 are not moot. For purposes of deciding whether an appeal is moot, the relevant inquiry is whether the Court can grant effective relief. *Church of Scientology of California* v. *United States*, 506 U.S. 9, 12-14 (1992). Effective relief can be granted here. If the Court reverses the district court judgment, Act 1 would become the State's legally effective redistricting plan and future elections would

be held in accordance with that plan. The appeals in this case are therefore not moot.*

2. As we argue in our Jurisdictional Statement, in holding that District 4 in Act 1 is unconstitutional, the district court failed to give sufficient weight to Louisiana's traditional redistricting practices. In particular, the district court failed to evaluate the constitutionality of District 4 in light of the similarity of that district to old District 8. That legal error infected both the court's determination that strict scrutiny was applicable and its determination that District 4 does not satisfy the compactness requirement set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). See J.S. 13-14, 16-17. The district court also made several clearly erroneous findings concerning the role that race played in the redistricting process. J.S. 14-16. Those legal and factual errors warrant this Court's plenary review.

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* If the Court were to conclude that the appeals are moot, the correct course would be to vacate the district court's judgment. *Department of Treasury* v. *Galioto*, 477 U.S. 556 (1986); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). Otherwise, parties in future litigation would be free to argue that the United States and defendant-intervenors are bound by determinations made by the district court in this case. The United States and the defendant-intervenors "ought not in fairness" be subject to such consequences. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994). In arguing that a determination of mootness should not lead to vacation of the judgment below, appellees rely (Mot. to Dis. 14) on the Court's holding in *U.S. Bancorp*, 115 S. Ct. at 393, that a party who voluntarily moots an appeal is not entitled to the equitable remedy of vacatur. That holding may be applicable to the State of Louisiana; it has no application to either the United States or the defendant-intervenors.

Appellees nonetheless argue that, if the Court reaches the merits, it should summarily affirm the district court's judgment. Mot to Dis. 15-25. Our Jurisdictional Statement addresses most of the arguments made by appellees in support of the judgment below. We limit our response here to the arguments made by appellees that we have not previously addressed.

a. Appellees contend (Mot. to Dis. 16, 23) that Ronald Weber's testimony on mathematical measures of compactness supports the district court's finding that District 4 is not geographically compact. The Constitution, however, does not require a State to construct its districts in accordance with mathematical models of compactness. See *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993). The relevant inquiry is whether the State concluded in "good faith" that District 4 was reasonably compact when compared with old District 8. *Miller* v. *Johnson*, 115 S. Ct. 2475, 2488 (1995). Since District 4 is only ten miles longer than one version of old District 8, and is similar in appearance to various versions of it, the State acted in good faith when it concluded that District 4 is reasonably compact.

In any event, appellees have not fairly characterized Weber's testimony. Weber calculated three "mathematical" measures of compactness: a population test, a dispersion test, and a "max aspect" test. Weber Test., 10/30/95 p.m., Tr. 161. Weber testified that District 4 scored approximately as well or better on the population test as all five versions of old District 8 in place since 1970. *Id.* at 162-163. He testified that District 4 in Act 1 scored worse on the dispersion test than the 600 mile-long Z-shaped District 4 in Act 42. *Id.* at 103-104. That testimony

raises serious questions about the validity of the dispersion test as a measure of compactness. And Weber admitted that the max aspect test was unreliable. *Id.* at 161. Accordingly, to the extent that Weber's testimony is relevant, it reinforces the conclusion that the State acted in good faith when it determined that District 4 in Act 1 is reasonably compact when compared to old District 8.

b. Appellees also err in relying (Mot. to Dis. 21) on Weber's testimony that District 4 in Act 1 more closely resembles the 600 mile-long Z-shaped District 4 in Act 42 than old District 8. Weber focused exclusively on the overlap in population among the districts. *Ibid.* The State, in contrast, reasonably focused on the size, geographic location, and appearance of the districts as well. When assessed against all the relevant criteria, District 4 resembles old District 8 far more than the Z-shaped district.

c. Appellees contend (Mot. to Dis. 18-19) that Glenn Koepp testified that he used only racial information in constructing the boundaries of District 4. The testimony cited by appellees, however, shows only that Koepp's computer contained racial data, and that it did not contain certain other data, such as socioeconomic data. The testimony does not remotely suggest that Koepp used only racial data in constructing the districts. Indeed, in a passage in his testimony omitted by appellees, Koepp made clear that the computer program he was using allowed him to compare the district he was drawing with districts in other plans. Koepp Dep. at 79. Koepp also testified that he considered other factors in devising District 4, including compactness and contiguity. *Id.* at 45-46, 146-148; Koepp Test., 7/21/94 a.m., Tr. 13-14, 25. Appellees' assertion that Koepp testified that he relied

exclusively on race in drawing District 4 is therefore incorrect.

d. Appellees contend (Mot. to Dis. 19) that a letter written by the head of the Civil Rights Division of the Department of Justice to counsel for the defendant-intervenors "loudly proclaimed DOJ's maximization policy" and "foreordained" that race would predominate in the redistricting process. Appellees are mistaken. The letter cited by appellees responded to an inquiry by counsel for the defendant-intervenors concerning whether the decision in *Hays I* invalidating Act 42 had affected the views expressed by the Department of Justice in the *Hays I* litigation. In that litigation, the Department had argued that the State had a strong basis in evidence for its conclusion that the Voting Rights Act required the drawing of a second majority-black district. The letter made clear that the Department had not changed its view. It stated that:

> Evidence in the record [of the *Hays I* proceeding] demonstrates that the three preconditions under *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), are satisfied, giving Louisiana a strong basis for taking action to avoid a Section 2 violation. The plaintiffs' own plans, developed and presented at trial by Dr. Weber, demonstrate that the black population is sufficiently numerous and geographically compact such that two reasonably compact districts with black voting age population majorities can be drawn. In addition, there is uncontradicted evidence that voting is racially polarized in congressional elections, sufficient to satisfy the second and third *Gingles* preconditions.

PX 21, at 2. That discussion reflects a straightforward application of the standards set forth by this Court in *Gingles* for determining whether the preconditions for a Section 2 violation have been established. It is not evidence of a "maximization policy."

Appellees' assertion that the Department of Justice letter "foreordained" the State's policy choices is also unsupported by the record. Glenn Koepp devised his plan without having had any communication with the Department of Justice concerning that plan. Koepp Dep. at 134. The State Senate passed Koepp's plan, containing two majority-black districts, before the Department of Justice sent the letter to counsel for defendant-intervenors. And not a single state legislator testified that the letter affected his vote on Act 1.

* * * * *

For the foregoing reasons, as well as those in our jurisdictional statement, the Court should note probable jurisdiction.

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

JUNE 1996

No. 95-1682

Supreme Court, U.S.
FILED
JUL 11 1996
CLERK

IN THE

# Supreme Court of the United States

October Term, 1995

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LOUISIANA LEGISLATIVE BLACK CAUCUS,
CONGRESSMAN CLEO FIELDS,
BERNADINE ST. CYR, PATRICK FONTENOT,
HAZEL FREEMAN and RALPH WILSON,

*Appellants,*

v.

RAY HAYS, *et al.*,

*Appellees.*

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**On Appeal from the United States District Court for the Western District of Louisiana**

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## BRIEF ON BEHALF OF LOUISIANA LEGISLATIVE BLACK CAUCUS, *ET AL.* IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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## BRIEF OF LOUISIANA LEGISLATIVE BLACK CAUCUS, *ET AL.*, IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellants, the Louisiana Legislative Black Caucus, Congressman Cleo Fields, and Louisiana voters Bernadine St. Cyr, Patrick Fontenot, Hazel Freeman, and Ralph Wilson, submit this brief in opposition to appellees' Motion to Dismiss or Affirm.

### I. THE APPEAL IS NOT MOOT.

#### A. Appellees' Mootness Argument Would Require this Court to Overturn Decades of Precedent Under Section 5 of the Voting Rights Act.

As a necessary predicate for their argument that the appeal is moot, appellees urge this Court to rule that the preclearance requirements of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, do not apply to the Louisiana Legislature's adoption of a new congressional redistricting plan, Act 96. Motion to Dismiss or Affirm at 12-14. Of course, if preclearance is required under Section 5, then Act 96 is not enforceable as law "until and unless" precleared, *Connor v. Waller,* 421 U.S. 656 (1975) (per curiam), and the attempted repeal of Act 1 is of no legal effect at this time, foreclosing any claim of mootness.

Appellees' novel argument that Section 5 preclearance is unnecessary conflicts with decades of settled precedent under Section 5.[1] Appellees argue that

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[1] *See Georgia v. United States,* 411 U.S. 526 (1973) (redistricting plans are changes with respect to voting subject to Section 5 preclearance); *McDaniel v. Sanchez,* 452 U.S. 130 (1981) (redistricting plans are subject to Section 5 preclearance even when enacted in direct response to federal court order).

preclearance of Act 96 is not required because the Louisiana Legislature merely enacted a redistricting plan to comply with an order of the federal district court. Motion to Dismiss or Affirm at 13 ("Surely the Voting Rights Act does not prevent a State from enforcing the voting procedures it has been *ordered* to follow by a three-judge federal court") (emphasis in original).[2] This Court rejected just such an argument in *McDaniel v. Sanchez*, holding as follows:

> As we construe the federal mandate, it requires that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people -- *no matter what constraints have limited the choices available to them* -- the preclearance requirement of the Voting Rights Act is applicable.

452 U.S. at 153 (emphasis added). Further, in support of its holding in *McDaniel*, this Court cited the legislative history accompanying Section 5, as follows:

> "The one exception where Section 5 review would not ordinarily be available is where the court,

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[2] Elsewhere, appellees unceremoniously abandon this characterization of the Legislature's action, instead declaring it a voluntary political decision. *See* Motion to Dismiss or Affirm at 1 ("rather than have a federal-court plan imposed on Louisiana by force, the State has decided to adopt that plan voluntarily. The political process has worked.") Notwithstanding appellees' indecision on this issue, for purposes of Section 5 review, legislative action does not enjoy a safe harbor simply because it is alleged to be responsive to a federal court order. *McDaniel v. Sanchez*, 452 U.S. at 148-149. In any event, the district court did not order Louisiana to enact legislation repealing Act 1.

> because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant. This is the limited meaning of the 'court decree' exception recognized in *Connor v. Johnson*, 402 U.S. 690. *Even in these cases, however, if the governmental body subsequently adopts a plan patterned after the court's plan, Section 5 review would be required.*"

*McDaniel v. Sanchez*, 452 U.S. at 149, quoting S. Rep. No. 94-295, pp. 18-19 (1975) (emphasis added). Thus, the argument that Act 96 somehow did not effect a change covered by Section 5, even though it repealed Act 1 and replaced it with a new redistricting scheme that dramatically reduces black voting strength in electing Louisiana's congressional delegation, simply collapses when examined in light of *McDaniel v. Sanchez*.

Because Act 96, including its repeal of Act 1, is not valid as law without preclearance, *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991), the appeal of the District Court's judgment striking down Act 1 is not moot. If the district court's decision striking down Act 1 is reversed (and/or stayed) by this Court, Act 1 will be the legally enforceable plan in effect in Louisiana. An appeal is not moot when this Court can grant effective relief, *see Church of Scientology of California v. United States*, 113 S. Ct. 447, 449 (1992), and this Court clearly can grant such relief on this appeal, given the absence of any precleared replacement legislation.[3]

---

[3] Furthermore, even if Louisiana were to obtain preclearance for its legislation, the appeal would not be moot. The district court's injunction permanently bars Louisiana from implementing any congressional redistricting plan other than the plan created by the

**B. If the Appeal Were Moot, the Judgment Below Clearly Would Be Subject to Vacatur.**

Even if the appellees could establish that the enactment of unprecleared legislation moots this appeal, the proper relief would be an order vacating the district court's judgment. The defendant-intervenors, all of whom are proper parties to this appeal, are in no way responsible for the enactment of Act 96. If all appeals from the judgment below are moot by virtue of the Louisiana Legislature's enactment of a new apportionment scheme, then the appealing parties (excepting, *arguendo*, the State of Louisiana through its Attorney General) should not be bound by a judgment, review of which they sought without success due to circumstances beyond their control, *see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 390, 391 (1994), *citing Karcher v. May*, 484 U.S. 72, 82, 83 (1987), and *United States v. Hamburg-Amerikanische*

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district court unless Louisiana obtains advance approval for such plan from the court. La. J.S. App. 39-40. The district court's order includes no time limit but applies to all future congressional redistricting efforts by the state. *Id.* In the absence of the district court's injunction, Louisiana would be free to reinstate Act 1 or another redistricting plan different from the plan ordered by the federal court. Moreover, in light of the narrow margin by which Act 96 passed the Louisiana Senate (20-19), many legislators obviously harbored substantial doubts as to the desirability of the plan, and there is no question but that the Louisiana Legislative Black Caucus, whose members voted against Act 96, would introduce legislation to restore Act 1 or a similar plan if the decision below is reversed. Thus, this Court's reversal of the district court's decision would grant effective relief by removing the bar of the district court's injunction and permitting the Louisiana Legislature to conduct congressional redistricting free of the constraints imposed by the district court.

*Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 477-78 (1916).

In requesting that the judgment remain standing, despite the alleged mootness of the appeal, appellees rely on cases where all of the appellants who were proper parties to the appeal had voluntarily chosen to moot the case or to drop any appeal. Motion to Dismiss or Affirm at 14, citing *Karcher v. May* and *U.S. Bancorp*. Such cases are simply inapposite here, where the defendant-intervenors are proper parties to the appeal, *see Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-376 (1987), and the defendant-intervenors opposed the enactment that is alleged to result in mootness.

As this Court recognized in *U.S. Bancorp*, "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp*, 115 S. Ct. at 393.[4] Defendant-intervenors are in

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[4] *U.S. Bancorp* involved a request to vacate a lower court judgment that had become moot because of a formal settlement of a commercial dispute by private parties; the narrow holding of the decision is simply that "mootness by reason of settlement does not justify vacatur of a judgment under review." 115 S. Ct. at 393. Even Louisiana, the sole appellant to which the *U.S. Bancorp* ruling could arguably apply, entered into no settlement with the plaintiffs in this case. Under such circumstances, the *U.S. Bancorp* ruling would not necessarily bar vacatur even if Louisiana were the sole appellant. *See Crowell v. Mader*, 444 U.S. at 506 (1980) (ordering vacatur of district court judgment striking down 1973 redistricting plan after Tennessee legislature enacted new redistricting plan in response to district court ruling); *cf. Haley v. Pataki*, 60 F.3d 137, 142 (2d Cir. 1995) (holding that vacatur of injunction was proper under *U.S. Bancorp* where Governor had voluntarily complied with injunction).

precisely that position here, because they would face arguments that the judgment is preclusive with respect to potential challenges to the legality of Act 96 if the judgment is not vacated, even though they were unable to obtain review of the judgment. *See also Associated General Contractors v. City of New Haven*, 41 F.3d 62, 67 (2d Cir. 1994) ("A party should not suffer the adverse *res judicata* effects of a district court judgment when it is denied the benefit of appellate review through no fault of its own").

Further, even if the State of Louisiana were the only appellant in the case, extending the holding of *U.S. Bancorp* to prevent vacatur here would raise troubling questions because it could effectively serve as a method to evade proper Section 5 review of legislative enactments. Indeed, plaintiffs frankly admit that the purpose of their request for dismissal of these appeals without vacatur of the judgment below is to preclude Section 5 review of Act 96. Motion to Dismiss or Affirm at 14 n.2. Under plaintiffs' theory, if the judgment remains standing despite the absence of an opportunity for appellate review, the State could rely upon the district court's unreviewed ruling to argue that the district court plan is the required benchmark for Section 5 review, thus shielding Act 96 from any meaningful scrutiny of its discriminatory effect and purpose in the Section 5 review process. Application of the *U.S. Bancorp* ruling in this situation would thus have the perverse effect of encouraging manipulation of the litigation process to avoid meaningful Section 5 review, a result against which this Court warned in *McDaniel v. Sanchez*, 452 U.S. at 151.

## II. THE COURT SHOULD NOTE PROBABLE JURISDICTION

Appellees offer no cogent defense of the district court's decision, in part because they completely ignore a central legal error on which the district court's decision is based: the district court erroneously believed that Louisiana was barred from modeling District 4 on previous versions of the majority-white old 8th District because "the 'Old Eighth' was never challenged on constitutional grounds." *Hays III*, La. J.S. App. 17 n.48; *see also Hays II*, La. J.S. App. 66 (opinion for court), 78-79 (Shaw, D.J., joined by Wiener, J., concurring). By treating Louisiana's past redistricting practices as inherently suspect, the court erroneously substituted its own redistricting preferences as the benchmark of constitutionality.[5]

This critical error -- which appellees do not even attempt to defend -- infects both major elements of the district court's judgment. By assuming the illegality of

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[5] *Abrams v. Johnson*, No. 95-1425, and *United States v. Johnson*, No. 95-1460, *prob. jur. noted*, __ S. Ct. __ (May 20, 1996), present the issue, *inter alia*, of whether a district court unjustifiably departed from state policy when it redrew Georgia's congressional districts after the state legislature *failed* to agree on a new, remedial redistricting plan. This case presents the related but separate issue of whether a district court overstepped its proper role by invalidating a remedial redistricting plan, Act 1, which the state legislature itself passed in response to *Shaw v. Reno*, 113 S. Ct. 2816 (1993). This case also presents, like the Georgia appeals, the question of whether the district court's substitute remedial plan improperly disregarded the requirements of Section 2 of the Voting Rights Act. Defendant-Intervenor J.S. at 27-29; *see id.* n.21. The Court could address these issues comprehensively by considering this case in tandem with the Georgia appeals.

Louisiana's past redistricting plans, the district court was unable to make a proper determination of whether Act 1 so disregarded the State's traditional practices as to require strict scrutiny under *Miller v. Johnson*, 115 S. Ct. 2475 (1995). *See* Defendant-Intervenors' J.S. at 14-15.[6] The same legal error prevented the district court from properly assessing whether Louisiana was justified in adopting Act 1 in light of Section 2 of the Voting Rights Act; the resemblance between District 4 and the old 8th District made it reasonable for the Legislature to conclude that the black population in Louisiana was sufficiently large and geographically compact to comprise a majority in two districts.[7] *Id.* at 21-13. Contrary to appellees' argument,

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[6] The district court's only other explanation for disregarding the resemblance between District 4 and the old 8th District was its conclusion that the large black population concentration in the old 8th should somehow disqualify it from serving as a permissible basis for a congressional district. *See* La. J.S. App. 16. Appellants have already discussed the clear defects in this reasoning. Defendant-Intervenor J.S. at 15. Further, Appellees indulge in semantics by arguing that the defendants proffered below, then somehow "abandoned," an entirely separate "Red River justification" for the 4th District. Motion to Dismiss or Affirm at 20. Louisiana's 8th District, from 1967 through 1992, was generally centered on the Red River and Mississippi River valleys. Thus, in creating a district modeled on the old 8th, the Legislature also created a district reflective of the commonalities encompassed by this Red River-Mississippi River axis.

[7] The district court's legal error in assessing this Section 2 factor is particularly critical because the other two central factors, black political cohesion and legally significant white bloc voting, are unquestionably present in Louisiana, as established by overwhelming statistical evidence. Defendant-Intervenor J.S. at 18-20. Appellees make no serious argument that these factors are not established by the record here.

such critical legal errors are not shielded from review by the "clearly erroneous" standard. *Johnson v. De Grandy,* 114 S. Ct. 2647, 2662 (1994).

Rather than address this error, appellees argue, in effect, that the Louisiana Legislature should have been guided by mathematical measures of compactness that allegedly disfavor District 4. As defendant-intervenors have already pointed out, however, some of those mathematical measures in fact show District 4 to be similar to Louisiana's previous districts. Reply of Louisiana Legislative Black Caucus, et al., in Further Support of Application for Stay, at 3-4; *see* 10/30/95 Tr. 162-63, testimony of Dr. Ronald Weber, plaintiffs' expert ( "For the population compactness, it's saying basically that the [District] 4 population compactness is relatively the same as the compactness of the old District 8 configurations"). Furthermore, the Legislature properly relied upon the obvious visual similarity between District 4 and the old 8th District. Defendant-Intervenor J.S. at 22. Appellees' reliance on mathematical compactness scores that were not even before the Legislature is thus the only pertinent example of "post-hoc rationalization" revealed by the record.[8]

The appeal in this case remains the first in which a state legislature redrew its congressional districts so as to comply with the principles announced in *Shaw v. Reno*, only

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[8] Similarly, contrary to appellees' strained argument, the absence of "compactness" data on Mr. Koepp's computer screen does not remotely support a finding that Act 1 was constructed without regard to non-racial factors. Both Mr. Koepp and the Louisiana Legislature have knowledge of Louisiana and its redistricting history independent of that appearing on Mr. Koepp's computer screen. *See* Defendant-Intervenor J.S. at 4-6 (describing testimony of Glenn Koepp and Louisiana legislators as to process of creating Act 1).

to have its redrawn plan again struck down by a federal court that treated its own redistricting preferences as the only appropriate model for the state to follow. The district court's decision striking down Act 1, replacing it with a plan that dramatically dilutes the votes of black Louisianans, and permanently enjoining Louisiana from implementing any other plan without advance approval from the court, is of extraordinary importance to the people of Louisiana. It also presents the opportunity for this Court to establish how far the federal courts should go in taking over the redistricting process under the aegis of *Shaw* and *Miller*, a matter on which guidance is of vital importance to lower courts and state legislatures confronting litigation under those decisions.

## CONCLUSION

The Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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